Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KANOWITZ FRUIT AND PRODUCE CO., INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA and
UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the revocation of a Perishable Agricultural Commodities Act ("PACA") license by the United States Department of Agriculture (the "USDA") arbitrary and capricious when the USDA's actions prevent a financially responsible PACA licensee from complying with the statute and regulations?

2. Did the United States Court of Appeals for the Second Circuit err by failing to follow the Eighth Circuit's relevant factor test for the revocation of a license?

STATEMENT PURSUANT TO RULE 29.6

The petitioner has no parent company and has no subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Regulations Involved	1
Statement of the Case	2
A. Statement of Facts	3
B. The Proceedings Below	6
Reasons for Granting the Writ	9
I. This Petition Should Be Granted Because The USDA's Arbitrary And Capricious Exercise Of Discretion Actually Prevented KFP From Complying With The Statute.	9
II. The Petition Should Be Granted Because The Opinion Below Conflicts With The Eighth Circuit's "Relevant Factors" Test.	12

Contents

	Page
The Relevant Factors Test	13
A. Whether the Company's conduct threatens to undermine PACA's Purpose.	13
B. The circumstances of the violation.	13
C. The effect of the sanction on the Company. ...	14
Conclusion	19

TABLE OF CITED AUTHORITIES

Page

Cases:

ABL Produce Inc. v. U.S.D.A., 25 F.3d 641 (8th Cir. 1994) 2, 12, 13, 18

Andershock Fruitland, Inc., et al. v. United States Department of Agriculture, 151 F.2d 735 (7th Cir. 1998), 55 Agric. Dec. 1204 (1996) 18

Burlington Truck Lines v. United States, 371 US 156, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962) 2, 18, 19

Conforti v. United States, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 136 L. Ed. 2d 14 (1996) 2, 12, 13, 18

Gilardi Truck and Transportation, Inc., 43 Agric. Dec. 118 (1984) 7

Havana Potatoes of New York Corporation and Havana, Inc. v. U.S. Department of Agriculture and the U.S. Secretary of Agriculture, 136 F.3d 89 (2nd Cir. 1997) 13, 14, 18

In re Andershock Fruitland, Inc., 55 Agric. Dec. 1204 (1996) 18

In re Carpenito Bros., Inc., 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d (D.C. Cir 1988) 6, 8

In re Scamcorp, Inc. d/b/a Goodness Greeness, 1998 WL 92817 (U.S.D.A.) 6, 16

Cited Authorities

Page

In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476 (1991). 15, 18

Motor Vehicle Mfrs. Assn. of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) 10

Necketopoulos v. Shalala, 941 F. Supp. 1382 (S.D.N.Y. 1996) 10

Vessechio Wholesale Produce Co. Inc. [no cite] 9

Statutes:

5 U.S.C. § 601, *et seq.* 6

5 U.S.C. § 706(2)(A) 12

7 U.S.C. § 499b(4) 1, 2, 6, 7

7 U.S.C. § 499(h) 1

28 U.S.C. § 1254(1) 1

7 C.F.R. § 46.2(aa)(5) 1, 2

7 C.F.R. § 46.2(aa)(11) 1, 2, 4

7 C.F.R. § 46.46(e)(1) 1, 4

7 C.F.R. § 46.46(e)(2) 1, 4

Cited Authorities

Page

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Committee on Agriculture, House of Representatives, March 16, 1995, Serial No. 104-7, pg. 12, Report 104, July 26, 1995 18

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 71 (1995) 16, 17

APPENDIX

Page

Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed October 29, 1998 ..... 1a

Appendix B — Order Of Judicial Officer William G. Jenson Denying Petition For Reconsideration In *In Re: Kanowitz Fruit And Produce Co., Inc.* Dated And Filed June 5, 1997 ..... 7a

Appendix C — Decision And Order Of Judicial Officer William G. Jenson In *In Re: Kanowitz Fruit And Produce Co., Inc.* Dated And Filed March 21, 1997 ..... 32a

Appendix D — Decision And Order Of Administrative Law Judge Edwin S. Bernstein In *In Re: Kanowitz Fruit And Produce Company, Inc.* Dated And Filed May 29, 1996 ..... 72a

Appendix E — Relevant Statutes And Regulations ... 84a

Petitioner, Kanowitz Fruit and Produce Co. Inc. ("KFP"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit in *Kanowitz Fruit and Produce Co. Inc. v. United States of America and United States Department of Agriculture* Civ. No. 97-4224 is not published, but can be found at 1998 WL 86340 (2nd Cir.) (Appendix A, page 1a). The Opinion and Order of the Judicial Officer, William G. Jensen, for the U.S.D.A. dated and filed June 5, 1997, 56 Agric. Dec. 942 and the Opinion and Order of the Judicial Officer, William G. Jensen, dated and filed March 21, 1996, 56 Agric. Dec. 917, are Appendix B at 7a, and at 32a, respectively. The May 5, 1996 Decision and Order of Administrative Law Judge, Edwin S. Bernstein, appears at Appendix D at 72a.

STATEMENT OF JURISDICTION

The summary order of the United States Court of Appeals for the Second Circuit was entered on the 29th day of October, 1998 within 90 days of filing.

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

7 U.S.C. § 499b(4) (App. E at 87a-88a);
7 U.S.C. § 499(h) (App. E at 88a);
7 C.F.R. § 46.2(aa)(5) & (11) (App. E at 84-85a);
7 C.F.R. § 46.46(e)(1) & (2) (App E at 86a).

STATEMENT OF THE CASE

The fundamental issue in this case is whether the United States Department of Agriculture ("USDA") abused its discretion and acted arbitrarily by automatically choosing the remedy of revocation of license rather than considering a fine for Petitioner, Kanowitz Fruit & Produce Co. Inc. ("KFP") for failure to pay its produce suppliers "promptly" (as that term has been defined in 7 C.F.R. § 46.2(aa)(5) and (11)) in violation of 7 U.S.C. § 499b(4). The USDA, in applying its automatic remedy selection procedure, rather than considering the factors relevant to the purposes of the PACA, such as those used by the Eighth Circuit in *Conforti v. United States*, 74 F.3d 838 (8th Cir. 1996) and *ABL Produce Inc. v. U.S.D.A.*, 25 F.3d 641 (8th Cir. 1994) refused to consider factors critical to effectuating the purposes of the PACA. *See Burlington Truck Lines v. United States*, 371 US 156, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962). The USDA failed to consider that: (1) KFP paid all the unpaid claims of suppliers listed in the USDA's complaint and amended complaint prior to the Department's administrative hearing; (2) presented uncontested evidence at the hearing that it was a profitable business with a net worth several times the amount of its payables at the time of the hearing; (3) that its delay in paying suppliers was the result of an embezzlement by KFP's former employees; (4) there was no history of complaints to the USDA against KFP prior to the embezzlement; and (5) prior to the hearing, KFP *obtained* and produced to the USDA a commitment for an SBA guarantied loan which would provide it with more than sufficient funds both: (a) to pay all its suppliers on the ten-day prompt pay terms unfairly required by the USDA without regard to longer terms permitted by its suppliers; and (b) to pay a reasonable fine to the USDA. The USDA's blind adherence to its preferred remedy in this case resulted in the determination to revoke the license of a financially responsible licensee when a fine would have been an effective deterrent. This result is contrary to the purposes of the PACA.

A. Statement of Facts

The Petitioner, KFP, is a dealer in perishable agricultural commodities with its principal place of business in the Brooklyn Terminal Market in Brooklyn, New York. KFP is licensed under the PACA and had been paying suppliers in a timely manner without any complaints to the USDA until it fell victim to a $300,000 to $400,000 embezzlement in 1993. KFP still had a very substantial net worth after this embezzlement, based upon the inclusion of the value of its units in the Brooklyn Terminal Market, which KFP estimated at the hearing to be worth $800,000 (not counting the warehouse and unit that it sold after the embezzlement to raise capital). However, its unanticipated cash shortage forced KFP to delay paying suppliers. KFP could have walked away from the business or filed in bankruptcy if it had anticipated the fate intended for it by the USDA but instead, KFP attempted to conduct itself as the truly responsible licensee it was by making, as Judge Bernstein found, "a bona fide commitment" to overcome its losses from the embezzlement and pay all its suppliers. KFP's problems were compounded by the fact that one of its biggest customers was the City of New York (for sales to schools), a very slow payer, although an excellent credit risk. The USDA does not seriously contend that KFP had another course of action open to it which would not have resulted in late payment to its suppliers. Nevertheless, the USDA determined that by deciding to continue in business, rather than going out of business, KFP willfully violated the PACA by purchasing produce for which it would not be able to make payment within the strict requirements of the act and regulations.

KFP took many steps to recover from the embezzlement it sold its warehouse and one of its units, it stayed open seven days a week, an employee loaned the Company $50,000 without due date, it sought and obtained profitable cruise line business and walk-in trade.

KFP also paid all the amounts listed in the complaint and amended complaint prior to the hearing on the disciplinary charge brought against it by the USDA and negotiated extended payment terms with its produce suppliers.

USDA regulations require that payment terms of over 10 days from acceptance be in writing (7 C.F.R. § 46.2(aa)(11)). However, a USDA witness at the hearing admitted that longer oral payment terms were customary in the New York produce markets. Produce vendors refuse to put verbal terms over 10 days in writing in order to preserve their right to PACA statutory trust protection, which gives produce vendors a powerful collection tool in the event of nonpayment by their customers, *See* 7 C.F.R. §§ 46.46(e)(1) & (2). This practice, however, masks a much different reality.

According to the Blue Book credit reporting service, acknowledged by a USDA witness as being one of the two major services for the industry, only approximately 60 New York produce purchasers were rated as paying within 21 days and approximately 80 companies were rated as paying in excess of 30 days at the time of the hearing. Indeed, the uncontested and admitted evidence at the hearing demonstrates that if the USDA audited all New York produce purchasers in the manner that it did with KFP and enforced its prompt pay regulations on all companies found to be in violation by revocation of licenses, it would effectively destroy the industry that it is supposed to protect from "irresponsible" licensees.

As a result of the heroic efforts made by KFP, all pending nonpayment complaints against KFP at the USDA had been paid by the hearing. Although its suppliers were no longer complaining, KFP wanted to achieve full compliance with the USDA prompt payment regulation, despite the fact that other licensees were not being held to this standard. In order to

accomplish this goal and provide funding for any fine negotiated with the USDA, KFP obtained a commitment for a $250,000 SBA guarantied loan secured by the principal's house and life insurance. The bank would not close the loan unless a satisfactory resolution was reached with the USDA. The paperwork was submitted to the USDA, but their only settlement offer was a 60 day suspension. Such a suspension would have been tantamount to a revocation of license for a company whose largest customer, the New York City Schools, would be lost as a result.

The USDA failed and refused to consider the mitigating circumstances, the effect upon KFP's 25 employees and the disparate nature of the sanction against KFP in comparison with those imposed by the USDA upon larger licensees having committed more serious offenses. Particularly troubling was the use (or abuse) by the USDA of: (1) its discretion in deciding whether or not to bring disciplinary proceedings; (2) the timing of disciplinary hearings; (3) the confidentiality of its pre-complaint or pre-hearing settlements; (4) its ability to allow a fine in one case and then change its rules to prohibit such fines; and (5) to favor large licensees over small ones. This documented arbitrariness belies the claim by the USDA that its procedures are fair because it always terminates the license of produce purchasers who are not in full "compliance" at the time of the hearing.

The USDA used this completely specious argument to "explain", without contradicting the facts asserted by KFP: (1) its failure to revoke the license of Sysco Foods for allegedly committing a $1.5 million fraud on its produce purchasers; (2) its grant of a PACA license to Service America despite the fact that it had operated without a license, filed in Chapter XI bankruptcy and never completely paid its pre-filing non-trust produce creditors; (3) the agreement, just when the hearing was

to be held, to allow State Line Snacks a period of time to come into compliance and pay the fine despite unpaid produce bills of $327,876.49; and (4) the settlement on a pre-hearing fine to Vessechio Wholesale Produce Co. Inc. despite $362,000 of unpaid produce bills (the USDA did not obstruct the loan obtained by this licensee to pay the fine and, in fact, gave Vessechio one year to pay the fine).

A similar evasion of its revocation policy can be found on the public record in the recent case of *In re Scamcorp, Inc. d/b/a Goodness Greeness*, 1998 WL 92817 (U.S.D.A.). Scamcorp., the second largest distributor of organic produce in the United States, had initially been charged with failing to pay $634,791.13 promptly. In contrast with KFP's case, there is no indication in the decision that Scampcorp ever paid the entire amount prior to the hearing. Instead, one of its largest suppliers accepted a note in payment of $200,000 of its produce debt. The USDA policy which KFP is accused of violating with its so called "roll over debt", as first announced in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d (D.C. Cir 1988) prohibits payment terms of over 30 days. Nevertheless, the USDA accepted this note as bringing Scamcorp into compliance and fined it $82,500. Then, in clear violation of the Small Business Regulatory Enforcement and Fairness Act, 5 U.S.C § 601, *et seq.*, the USDA modified its rule to henceforth prohibit the acceptance of such notes being deemed "compliance".

B. The Proceedings Below

The USDA initiated a disciplinary proceeding against KFP by complaint dated October 26, 1994. The complaint alleged total unpaid and past due produce debts totalling $206,850.69 and sought a finding that KFP willfully, flagrantly and repeatedly violated Section 2(4) of the PACA (7 U.S.C.

§ 499b(4)) together with a determination revoking KFP's PACA license. On March 1, 1996 the USDA issued an amended complaint alleging that the amounts owed by KFP referred to in the original complaint had all been paid but that their late payment still violated Section 2(4) of the PACA and that there was a new past due debt of $195,495.10.

On the evening of May 2, 1996 the USDA served KFP's counsel with notice that it would rely at the hearing on amounts it alleged, based upon a recent audit of KFP's records, were currently unpaid by KFP although not mentioned in the complaint or amended complaint. A hearing was held on May 7, 1996 before Administrative Law Judge Edwin S. Bernstein. KFP objected to the admission of evidence derived from the recent audit based upon lack of reasonable notice and appropriate due process. KFP also introduced evidence and obtained admissions from USDA witnesses to the effect that these so called "roll over debt" violations were actually not past due as far as KFP's suppliers were concerned nor had anyone complained to the USDA.

Judge Bernstein issued a bench decision and order the same day finding: (1) that KFP had paid all amounts specified as unpaid in the complaint and amended complaint; (2) that prior to the embezzlement (approximately $300,000 to $400,000), KFP had been timely paying its suppliers; (3) that the principal of KFP had made a bona fide commitment to cure the problems resulting from the embezzlement and had taken steps to improve its cash position including selling its warehouse and one of its units in the Brooklyn Terminal Market, borrowing $50,000 and obtaining a commitment for an SBA guarantied loan in the amount of $250,000 secured by his personal property; but (4) that KFP had so-called "roll over" debt of approximately $125,000 and that, therefore, pursuant to the USDA policy set forth in *Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118 (1984) the appropriate sanction was revocation of license.

KFP appealed the ALJ's decision to the Judicial Officer, William G. Jenson, (hereinafter the "JO") who denied the appeal by decision dated March 21, 1997. The JO, noting KFP's argument that it was entitled to a lesser sanction for "slow pay" by the time of the hearing rather than "no pay", modified Judge Bernstein's findings to hold that KFP had not made full payment of certain of the amounts set forth in the complaint or amended complaint by the date of the hearing.

KFP sought reconsideration by Petition dated May 6, 1997 and presented further evidence to establish the payment of those items from the complaint and amended complaint which the JO had found to be not fully paid. KFP also presented evidence that the so called "roll over debt" could have been paid prior to the hearing with the SBA guarantied loan if the USDA had been willing to settle on a fine prior to the hearing. The JO, by decision dated June 5, 1997, denied KFP's Petition for Reconsideration. The JO did not consider KFP's evidence of payment but concluded that, even if KFP had paid all the amounts set forth in the complaint and amended complaint prior to the hearing, the appropriate remedy was revocation because of the evidence from the audit that KFP had not paid for produce more than 30 days after acceptance at the time of the hearing, citing *In re Carpenito Bros., Inc., supra.*

REASONS FOR GRANTING THE WRIT

I.

THIS PETITION SHOULD BE GRANTED BECAUSE THE USDA'S ARBITRARY AND CAPRICIOUS EXERCISE OF DISCRETION ACTUALLY PREVENTED KFP FROM COMPLYING WITH THE STATUTE.

The USDA's sanction of revocation of KFP's license became mandated by its own unilateral decision to refuse to offer KFP an option of a fine as a settlement of its complaint against KFP, as had been agreed to by the USDA in the case of *Vessechio Wholesale Produce Co. Inc.* In so doing, the USDA rendered it impossible for KFP to close on its SBA loan, notwithstanding the willingness of the bank to grant an extension of its loan commitment until the May 7, 1996 hearing date. Not permitting KFP to pay a fine before the hearing was an *ipso facto* imposition of the sanction of revocation *prior* to the hearing because by preventing KFP from obtaining the SBA loan (the SBA would not close on the loan if KFP's license was revoked) making it impossible for KFP to comply with the USDA's regulations.

The USDA *prevented* KFP from getting the SBA loan and therefor complying with their regulations.

There is conclusive evidence here of a bank, with the full backing of the United States Government through the SBA, ready, willing, able and committed to lend Two Hundred Fifty Thousand Dollars ($250,000), against total unpaid trade debt of One Hundred Twenty-five Thousand Dollars ($125,000) as of the date of the hearing, provided that KFP's license were not revoked or suspended, but rather that a fine be imposed, payable out of the ample proceeds of the SBA loan. Given these

circumstances, the imposition of the draconian sanction of revocation cannot be said to reflect solely upon the conduct and financial integrity of KFP, but turns in some measure upon an unfathomable and arbitrary decision by the USDA itself. It was the decision to reject a reasonable settlement which foreordained the ultimate sanction of revocation, and it is that decision which the USDA has quietly attempted to sidestep.

In determining whether the USDA has acted arbitrarily and capriciously, the Court must determine whether the agency's decision "was based on a consideration of the relevant factors and whether there had been a clear error of judgment." *Motor Vehicle Mfrs. Assn. of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866-67, 77 L. Ed. 2d 443, 458 (1983). Under this standard, the USDA's decision may be set aside

> if the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that was counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Necketopoulos v. Shalala, 941 F. Supp. 1382, 1390 (S.D.N.Y. 1996), *citing Motor Vehicle Mfrs. Ass'n., supra.*

The clear error of judgment in this case arises out of the USDA's failure to consider as an "important aspect of the problem" its own policy decision to refuse to permit KFP to pay a fine and the impact this had upon the SBA loan commitment which had been extended right up to the May 7 hearing date for the obvious purpose of insuring complete payment of all suppliers by the time of the hearing.

The USDA evidently did not comprehend, and chose to ignore, its own involvement as an aspect of the problem. The ALJ, Bernstein, referred to the Petitioner as having "obtained a small business loan," when, in fact, it had only obtained a commitment for a loan. Similarly, he stated that KFP "should have made sure it had sufficient capitalization with which to operate," without acknowledging or discussing that adequate capitalization was indeed available if KFP's license were not suspended or revoked.

The confusion on this point escalated in the first decision of Judicial Officer Jenson. In response to KFP's argument that it would be able to pay its suppliers with "new capital" rather than "roll-over debt," the Judicial Officer, citing the supposed existence of a small business loan, nevertheless asserted that KFP "did rob Peter to pay Paul":

> It is not relevant where the money to pay the produce seller originates. The only relevant factor is whether Respondent paid produce sellers in full by the date of the hearing. As it is, Respondent lacked the resources, from wherever derived, to pay all Respondent's produce sellers in full, which is the only relevant issue.

Again, the error here was the assumption that the SBA loan had been obtained, but still had been inadequate to pay all sellers. The Judicial Officer failed to consider, as a relevant factor, the USDA's own actions and their impact upon the availability of SBA funds which would have been *more* than adequate to pay all sellers in full, and which commitment had been extended right up to the date of the hearing. Even when this point was made explicitly in the Petition for Rehearing, the Judicial Officer again refused to consider the financing issue, and the USDA's impact upon it, as a relevant issue.

The repeated assertion that the *only* relevant issue was the failure to pay suppliers in full by the hearing renders the decision by the USDA arbitrary and capricious. The other relevant factor was whether the ability to pay suppliers in full was in some way dependent upon the USDA's choice of sanction, and whether that decision was exercised by the USDA with due regard for its probable effect upon financing. While the standard of review under 5 U.S.C. § 706(2)(A) would normally involve showing great deference to the agency, to defer to the USDA on this issue would grant the agency the arbitrary right to put some merchants out of business while permitting others access to necessary financing to stay in business. The decisions here fail to articulate any consistent rationale which recognizes the impact which the choice of sanction may have upon the ability to obtain financing.

It is the interrelationship between the penalty and financing which USDA has attempted to sidestep. The power which USDA has to foreclose a buyer's access to reasonable commercial financing cannot be invoked without some compelling rationale. Here, USDA has failed to recognize, let alone explain, why KFP's access to an SBA loan should be denied, when other merchants have been assessed civil penalties payable from the very types of loans which Petitioner sought. If USDA has the power to deal the cards, it should not have the right to call the trump. The result is capricious and unjust.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE EIGHTH CIRCUIT'S "RELEVANT FACTORS" TEST.

The Eighth Circuit, in *Conforti v. United States*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 136 L. Ed. 2d 14 (1996), applying the standard used in *ABL Produce v. U.S.D.A.*, 25

F.3d 641 (8th Cir. 1994), found the Secretary's sanction to be an abuse of discretion "without justification in fact,"

> because the J.O. failed to consider several "relevant factors," namely whether the Company's conduct threatens to undermine PACA's purposes, the circumstance of the violation, and the effect the sanction will have on the Company.

74 F.3d at 842.

THE RELEVANT FACTORS TEST

A. Whether the Company's conduct threatens to undermine PACA's Purpose.

The touchstone of disciplinary proceedings under the PACA is that only financially responsible persons should be permitted to engage in the perishable agricultural commodities industry. *Havana Potatoes of New York Corporation and Havana, Inc. v. U.S. Department of Agriculture and the U.S. Secretary of Agriculture*, 136 F.3d 89 (2nd Cir. 1997). What is more responsible than a company which lost $400,000 to an embezzlement paying all its suppliers rather than walking away or declaring bankruptcy? It is exactly this type of company that the Department should endeavor to preserve. As previously described and acknowledged by the ALJ, KFP undertook the most responsible course of conduct to recover from its embezzlement.

B. The circumstances of the violation.

The violation occurred because of an embezzlement. It was nothing the Company did or caused. Following the theft it took prompt steps to make sure it would never occur again, instituting

a new procedure to keep track of order tickets and giving up the warehouse. (KFP felt they couldn't supervise the warehouse properly.) More importantly, the violation was not willful, as it would have been if KFP had walked away or declared bankruptcy. It is true that it continued to purchase produce after the embezzlement but its accounts payable at that time would surely have gone unpaid if it hadn't endeavored to stay in business.

C. The effect of the sanction on the Company.

The effect is self-explanatory. By revoking KFP's license the Company would be out of business and twenty-five employees and their families would be without livelihoods, in a neighborhood that is already devastated by high unemployment. A responsible Licensee is removed from the industry while other much more serious offenders are not even charged. The mere threat of this sanction caused the company to lose an SBA loan. However, this loan may be revivable if a fine is determined. Ironically, due to continuing efforts to improve its business, KFP hopes to assure payment of all suppliers even if the USDA closes it down, a difficult feat for any company, since receivables are notoriously difficult to collect in this circumstance. When the relevant factors are reviewed, revocation of KFP's license is an abuse of discretion. The proper sanction, if any, should be a reasonable fine.

The Second Circuit and the USDA failed to consider the "relevant factors" test, instead they cite *Havana Potatoes of New York Corporation, et al. v. U.S.D.A., supra* (2d. Cir. 1997) at 94 stating:

> financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if

> the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of ongoing lack of funds.

But in this case, KFP had access to funds — the SBA loan — the USDA's *own* action prevented KFP from access to said funds to bring itself into full compliance with the Act and to pay a fine for its entirely unavoidable delayed payments to suppliers. Not only does KFP's conduct *not* threaten the purposes of the PACA, but the USDA's conduct DOES threaten such purposes by sending the message that any violator need not bother trying to repay suppliers since it will be forced out of business by the USDA anyway. This is *not* the purpose expressed by Congress.

The USDA's own case law holds that

> . . . the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476 (1991).

In 1995, Congress passed the PACAA-1995 civil penalty provision which provides:

> *ALTERNATIVE CIVIL PENALTIES*:
>
> In lieu of suspending or revoking a license under this section when the Secretary determines as provided by section 6, that a commission merchant, dealer, or broker has violated section 2 or subsection

> (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing "the amount o. a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts. (7 U.S.C. 499h)"

Prior to the passage of these amendments the Subcommittee on Risk Management and Specialty Crops of the House Committee on Agriculture considered a bill that would have repealed the PACA because an important segment of the produce industry sought its repeal due to excessiveness in its administration *Scamcorp, Inc., d/b/a Goodness Greeness*, *supra* at 59.

Mr. Keith Eckel testified on behalf of the American Farm Bureau Federation in opposition to repeal of the act and in favor of amendment as follows:

> Mr. Chairman, if you look at the farm bureau testimony, you'll find, number one, that in the issue of the slow pay and no pay that I highlighted, we strongly support intermediary steps short of revocation of license. We think that makes sense for the industry, and we would suggest that a schedule of fines be used to do that.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 71

(1995) (statement of Keith Eckel, President, Pennsylvania Farm Bureau).

Later, Congressman Pator asked Lon Hatamiya, Administrator, AMS, USDA about Mr. Eckel's testimony. Mr. Hatamiya stated,

> I think that's exactly right. We don't think there's any public interest in revoking or suspending somebody's license. We think that they need to be a part of that business marketing chain. And I think that fee or fine schedule would obviously allow us to do it in a different sort of way or enforce it in a different sort of way.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 81 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya repeatedly endorsed this Congressional suggestion a number of times during the hearings on the amendment of the Act, stating at one point:

> Because we recognize that the law can be improved we are prepared to work with the Congress and all segments of the industry to enhance PACA's effectiveness and fairness.
>
> In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

Hearing before the Subcommittee on Risk Management and Specialty Crops of the *Committee on Agriculture, House of Representatives*, March 16, 1995, Serial No. 104-7, pg. 12, Report 104, 207, July 26, 1995 to accompany H.R. 1103 at 10.

Nevertheless, the Second Circuit in *Havana Potatoes of New York Corporation et al. v. United States, et al., supra* at 93 relies on the USDA's decision in *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) for the proposition that *S.S. Farms Linn County, Inc., supra*, does not alter its automatic license revocation policy where a respondent is deemed to be not in "compliance" with the PACA at the time of the disciplinary hearing, notwithstanding the contrary policy enacted by Congress in the PACAA-1995. This automatic policy as stated in *Andershock Fruitland*, was affirmed by the Seventh Circuit in *Andershock Fruitland, Inc., et al. v. United States Department of Agriculture*, 151 F.2d 735 (7th Cir. 1998). In that decision, the court essentially recognized that it was at odds with the Eighth Circuit decisions in *Conforti, supra*, and *ABL, supra*. However, it is not merely the inconsistency of enforcement by the USDA of its "automatic" policy of revocation of license which make the application of this policy reversible error, but, rather, the failure of the USDA to adjust its choice of remedy procedure in light of the addition of the fine provision to the PACA in 1995. In this respect, the USDA's failure to consider factors like those described by the Eighth Circuit results in the putting out of business of financially responsible licensees in violation of the purposes of the PACA. The failure by the Agency to adjust to changes in the law and to properly apply the purposes of the Act in its selection of a remedy makes this case similar to that of *Burlington Truck Lines v. United States*, 371 U.S. 156, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962). The court concluded, in rejecting the ICC's choice of remedy:

> expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *New York v. United States*, 342 US 882, 884, 96 L ed 662, 663, 72 S Ct. 152 (dissenting legislative power to the unbounded discretion of the regulatory body. *Federal Communications Com. v. RCA Communications, Inc.*, 346 US 86, 90, 97 L ed 1470, 1475, 73 S Ct 998.

371 U.S. at 167.

CONCLUSION

This case presents a question of exceptional importance. Can the USDA by its own actions cause a company to be in noncompliance with the Agency's own rules and in contravention of Congress' legislation and intent?

By granting KFP's petition for certiorari, however, this Court can rectify a wrong and prevent an agency from running amuck.

Accordingly, KFP respectfully requests that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED OCTOBER 29, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 97-4224

* * *

KANOWITZ FRUIT AND PRODUCE CO., INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

SUMMARY ORDER

* * *

Petition for review of an order of the Secretary of the United States Department of Agriculture.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petition for review be and it hereby is DENIED.

This cause came on to be heard on the transcript of record and was argued.

Appendix A

Petitioner Kanowitz Fruit and Produce Co., Inc. ("KFP") petitions for review of an order of the Secretary of the United States Department of Agriculture ("Secretary"), revoking petitioner's license pursuant to the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a *et seq.* Petitioner contends, *inter alia*, that the regulatory scheme implementing the PACA is inconsistent with the purpose of the PACA and the realities of the produce industry, and that the Secretary improperly failed to take into account relevant mitigating circumstances concerning KFP before revoking its license.

After receiving a complaint from a Florida shipper who had sold produce to KFP, the Secretary began an investigation of petitioner. The Secretary subsequently initiated a disciplinary proceeding against KFP by complaint filed November 8, 1994. The complaint alleged that from February through November 1993, KFP failed to make full payment promptly to 18 sellers for 62 lots of produce, resulting in unpaid and past due produce debts totaling $206,850.60. The Secretary sought a finding by the Administrative Law Judge (ALJ) that KFP willfully, flagrantly and repeatedly violated § 2(4) of the PACA, 7 U.S.C. § 499b(4), and sought the revocation of KFP's license. KFP answered the complaint by denying it had violated the PACA and requested a hearing. KFP asserted that payment had been made within the terms agreed upon between the parties, and that any delays in payment were due to extraordinary circumstances beyond KFP's control — namely, that in 1993 KFP suffered an embezzlement of more than $200,000 by an employee.

On March 1, 1996, the Secretary filed an amended complaint alleging that the amounts referred to in the original complaint had been paid, but that their late payment — ranging

from 2 weeks to 117 weeks late — still violated the PACA. The amended complaint also alleged that, between January 1994 and January 1996, KFP incurred new debts totaling $195,495.10 for 108 lots of produce, which were past due to 30 sellers. KFP answered by again claiming that it had made payment in full, that payment was made within the terms agreed upon by the parties, and that the mitigating circumstance of the embezzlement excused any delay.

A hearing was held on May 7, 1996 before Administrative Law Judge Edwin S. Bernstein. The Secretary called two witnesses and KFP called two witnesses. At the close of the hearing, the ALJ issued a bench opinion finding that KFP had committed willful, flagrant, and repeated violations of the PACA by failing to make full payment promptly of the 170 lots of produce as alleged in the amended complaint. The ALJ also found that, at the time of the hearing, KFP owed approximately $125,000 in new debt for orders that had been made since the filing of the amended complaint. The ALJ found that the old debts had been paid by the date of the hearing only by KFP's having "rolled over" its debt, *i.e.*, using the proceeds from the new orders to pay off the old debts. The ALJ held that revocation was the appropriate sanction for petitioner, in light of the "number of violations, the seriousness of violations, the impact of violations on the industry as a whole, the interests of the Department in insuring the trust relationship which exists between members of the industry is maintained, the management decisions made by [petitioner], and the financial status of [petitioner]."

On June 24, 1996, KFP appealed the ALJ's decision to the Department's Judicial Officer ("JO"), to whom the Secretary has delegated final authority in adjudicative proceedings. The

JO essentially adopted the decision of the ALJ, with some analysis of his own, by opinion dated March 21, 1997. The JO later rejected KFP's petition for reconsideration by opinion dated June 5, 1997, but granted, upon KFP's request, a stay of the order pending judicial review.

The PACA is a remedial statute designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility. *See Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987). "It is an intentionally rigorous law whose primary purpose is to exercise control over an industry 'which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.' " *Id.* (quoting S. Rep. No. 84-2507 at 3 (1956), *reprinted* in 1956 U.S.C.C.A.N. 3699, 3701)).

The PACA requires all covered entities, such as petitioner, to make "full payment promptly" for all purchases of perishable agricultural commodities received in interstate commence. 7 U.S.C. § 499b(4). "Full payment promptly" has been defined as, *inter alia*, payment "for produce purchased by a buyer, within 10 days after the day on which the produce is accepted," 7 C.F.R. § 46.2(aa)(5), unless the parties have agreed, in writing and before entering into the transaction, to different payment terms. 7 C.F.R. § 46.2(aa)(11). If a covered entity does not meet PACA's requirements, the Secretary may, upon notice suspend or revoke an entity's license, or impose a fine. 7 U.S.C. § 499h(a). Revocation is authorized where "the violation is flagrant or repeated." *Id.* On review, the determination of a sanction by the Secretary will not be upset unless it is found to be "unwarranted in law or without justification in fact." *Harry Klein Produce Corp.*, 831 F.2d at 406 (internal quotation and

citations omitted). *See also County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265-66 (2d Cir. 1997).

Here, the ALJ found that petitioner's late payments to at least 48 suppliers over a period of over three years constituted flagrant and repeated violations which were not excused by the embezzlement. We find that the ALJ's factual findings are supported by substantial evidence, and that his conclusion that petitioner's violations were flagrant and repeated did not constitute an abuse of discretion. *See Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 90-92 (2d Cir. 1997). That petitioner engaged in "slow pay" as opposed to "no pay" of its suppliers does not alter our determination, *see id.* at 94, nor does petitioner's contention that payment was made within the terms agreed upon by the parties.

Under the PACA, parties may agree upon payment terms less stringent than those imposed by the Act, but they must put the terms in writing before the buyer may assert consent as a defense to a violation of the Act's prompt-payment requirement. 7 C.F.R. § 46.2(aa)(11). KFP did not produce any such writing, and there was no evidence that petitioner sought any such written agreements from its suppliers. *See Norinsberg Corp. v. United States Dep't of Agric.*, 47 F.3d 1224, 1227 (D.C. Cir. 1995). Instead, petitioner "continued to make produce purchases without fulfilling the Act's prompt payment mandate." *Id.* If, as petitioner alleges, PACA's requirements are inconsistent with industry custom or are counter-productive, "Congress is the body that must make that judgment." *Havana Potatoes*, 136 F.3d at 94. We do not find, given PACA's "prompt payment" requirement, that the Secretary's regulations enforcing prompt payment are "arbitrary, capricious, or manifestly contrary to the [PACA]." *Chevron U.S.A. v. Natural Res. Def. Council., Inc.*, 467 U.S. 837, 844 (1984).

We also disagree with petitioner's contention that the ALJ failed to consider the embezzlement and other proposed mitigating factors before revoking its license. Our review of the record indicates that petitioner's proposed mitigating factors were all considered, although rejected, by the ALJ. We do not find that the embezzlement suffered by KFP precluded a determination that petitioner's violations were willful and flagrant. *See In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991) ("A violation is willful if it is done intentionally or with careless disregard of statutory requirements."); *Havana Potatoes*, 136 F.3d at 94 ("Persistent violations indicate willfulness in the sense that a persistent violator must know when placing orders for produce that some or all will not be paid for in a timely fashion under PACA.").

As we noted recently, "financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of an ongoing lack of funds." *Havana Potatoes*, 136 F.3d at 94. Finally, petitioner's argument that the sanction here was arbitrary because lesser sanctions have been imposed in similar cases is not availing. *See Harry Klein Produce Corp.*, 831 F.2d at 407 (the "PACA does not require uniformity of sanctions for similar violations.").

We have carefully considered petitioner's remaining arguments and find them to be without merit. Accordingly, the petition is denied and we direct enforcement of the order.

FOR THE COURT:

s/ Lucille Carr
CAROLYN CLARK CAMPBELL, Clerk
by: Lucille Carr, Deputy Clerk

APPENDIX B — ORDER OF JUDICIAL OFFICER WILLIAM G. JENSON DENYING PETITION FOR RECONSIDERATION IN *IN RE: KANOWITZ FRUIT AND PRODUCE CO., INC.* DATED AND FILED JUNE 5, 1997

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. D-95-504

In re: Kanowitz Fruit and Produce, Co., Inc.,

Respondent

Order Denying Petition for Reconsideration

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant), instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA); the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) (hereinafter Regulations); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice) by filing a Complaint on November 8, 1994.

On March 1, 1996, Complainant filed an Amended Complaint which alleges that, during the period March 1993 through December 1993, Kanowitz Fruit and Produce Co., Inc. (hereinafter Respondent), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 18 sellers of the agreed purchase prices for 62 lots of perishable agricultural commodities in the total amount of

$206,850.69, which Respondent purchased, received, and accepted in interstate or foreign commerce and that, during the period January 1994 through January 1996, Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 30 sellers of the agreed purchase prices for 108 lots of perishable agricultural commodities in the total amount of $195,495.10, which Respondent purchased, received, and accepted in interstate or foreign commerce (Amended Complaint ¶¶ III, IV). Respondent filed an Answer on December 19, 1994, and an Amended Answer on April 1, 1996, in which Respondent denied violating the PACA.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on May 7, 1996, in New York, New York. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Sherylee F. Bauer, Esq., of New York, New York, represented Respondent. The ALJ issued a bench decision on May 7, 1996, in which he concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. 201) and revoked Respondent's PACA license (Tr. 208). On May 29, 1996, in accordance with 7 C.F.R. § 1.142(c)(2), the ALJ filed a written copy of the decision announced orally from the bench, which the ALJ excerpted from the transcript, corrected for spelling, punctuation, and transcription errors (hereinafter Initial Decision and Order).

On June 24, 1996, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's (hereinafter USDA) adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R.

§ 2.35).[1] On July 17, 1996, Complainant responded to Respondent's appeal, and on July 18, 1996, the case was referred to the Judicial Officer for decision.

On March 21, 1997, I issued a Decision and Order in which I found that Respondent had failed to make full payment promptly to 48 sellers of the agreed purchase prices, totalling $402,345.79, for 170 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce during the period March 1993 through January 1996. I concluded that such failures to pay constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Kanowitz Fruit and Produce, Co., Inc.*, 56 Agric. Dec. __, slip op. at 30 (Mar. 21, 1997). Based on this conclusion, I revoked Respondent's PACA license. *In re Kanowitz Fruit and Produce, Co., Inc., supra*, slip op. at 33.

On May 7, 1997, Respondent filed a Petition for Reconsideration and Oral Argument (hereinafter Petition for Reconsideration), and on May 28, 1997, Complainant filed Complainant's Objection to Respondent's Petition for Reconsideration. On May 29, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondent raises seven issues in its Petition for Reconsideration and requests the opportunity for oral argument. Respondent's request for oral argument is denied because the

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1. The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

issues are not complex and are controlled by established precedents, and thus, oral argument would appear to serve no useful purpose.

First, Respondent asserts that all produce sellers that were listed in the Complaint and the Amended Complaint were paid at the time of the hearing. Respondent contends that, under these circumstances, " 'slow pay' is the appropriate standard" (Petition for Reconsideration at 2).

Even if I were to find that Respondent had paid all the transactions alleged in the Complaint and the Amended Complaint by the time of the hearing, that finding would not cause me to treat this case as a "slow-pay" rather than a "no-pay" case. The long-standing USDA policy has been that a case will be treated as a "slow-pay case" warranting license suspension, rather than a "no-pay" case warranting license revocation, only if the respondent has paid the amounts alleged to be due in a complaint by the opening of the hearing (or if no hearing is to be held, by the time the answer is due), the respondent is in compliance with the payment provisions of the PACA and the Regulations by the opening of the hearing (or if no hearing is to be held, by the time the answer is due), and the respondent has no agreement with produce creditors for payment to be made beyond 30 days after the day on which the produce is accepted.[2]

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2. See, e.g., *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1268-72 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693, 700 (1995); *In re Lloyd Myers, Co.*, 51 Agric. Dec. 747, 763-65 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re The*

(Cont'd)

Thus, even if Respondent paid all of the amounts alleged to be due in the Complaint and the Amended Complaint by the date of the May 7, 1996, hearing, that payment alone would not convert this case from a "no-pay" to a "slow-pay" case because the record clearly establishes that Respondent had not paid all of its produce sellers at the time of the hearing. When a respondent is in a failure-to-pay-promptly disciplinary hearing, the respondent must be in 100% compliance with the payment provisions of the PACA to escape license revocation. Allowing a respondent who has not paid all produce sellers in full by the time of the hearing to remain licensed would put produce sellers at financial risk.

At the hearing, Respondent's bookkeeper, Frances Falcone, testified that Respondent had outstanding current indebtedness of approximately $125,000 (Tr. 160-61). This amount (within a few hundred dollars) is corroborated by the balances in the "Summary table of unpaid transactions" (CX 24A at 6; Tr. 194).

In order to convert this case from a "no-pay" to a "slow-pay" case and avoid revocation of its PACA license, Respondent would have to have paid every produce seller in full by the time of the hearing. There is no escaping the fact that Respondent paid some produce sellers, but not others.

Second, Respondent contends that its arrangements for financing, the reasonableness of the terms of its agreements with its produce creditors, and the payment practices of most persons in the perishable agricultural commodities industry are

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(Cont'd)

Caito Produce, Co., 48 Agric. Dec. 602, 634 (1989); *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 505-506 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988).

relevant to the existence of Respondent's roll-over debt, as follows:

> Rollover debt was determined at the last moment by applying statutory prompt payment terms to [Respondent's] payables without regard to its actual, commercially reasonable, terms or the financing, actually arranged, to pay all suppliers without "borrowing from Peter to pay Paul." Two of the best known credit services for the industry are the Blue Book and the Red Book. A review of the ratings of the companies listed illustrate that most of the industry is NOT in compliance with prompt pay. (Transcript pp. 183 and 184). Therefore, the department did not present evidence that [Respondent] slowed its payments to these later suppliers in order to pay the suppliers covered by the initial and amended complaints.
>
> Furthermore, [Respondent] had obtained an SBA commitment (see Exhibit "D") for a loan sufficient to pay all suppliers in full prior to the hearing. The loan was proceeding normally to a closing when [Respondent] was required by warranty provision to disclose this proceeding by the Department. The loan contained sufficient working capital to pay a reasonable fine, something the bank's counsel was prepared to entertain if this proceeding could be settled. By refusing to make a reasonable settlement of this matter after having been informed of the SBA commitment, the department caused the SBA to withdraw its commitment in the face of a threat by the

> Department to close down [Respondent]. (see Exhibit "E").
>
> It is therefore, solely because of the Department's action that there was any unpaid suppliers at the time of the hearing. The Department should not be permitted just prior to the hearing to cite for the first time commercially reasonable debt to suppliers (upon information and belief, none of whom complained to the Department about non-payment) when the Department obstructed the payment of these suppliers.

Petition for Reconsideration at 2-3.

I disagree with Respondent's contention that Respondent's financing, the payment practices of persons in the perishable agricultural commodities industry, and the "commercial reasonableness" of the terms of Respondent's agreements to pay produce creditors are relevant to the issue of Respondent's roll-over debt. The only issues relevant to the existence of roll-over debt are whether Respondent paid some or all of the amounts alleged to be due in the Complaint and the Amended Complaint by the beginning of the May 7, 1996, hearing, whether Respondent was in compliance with the payment provisions of the PACA and the Regulations by the beginning of the May 7, 1996, hearing, and whether any written agreement between Respondent and any of its produce creditors, executed in accordance with 7 C.F.R. § 46.2(aa)(11), provided that Respondent could pay for produce more than 30 days after the produce was accepted. *In re S W F Produce Co., supra*, 54 Agric. Dec. at 700; *In re The Caito Produce, Co., supra*, 48 Agric. Dec. at 634; *In re Carpenito Bros., Inc., supra*, 46 Agric. Dec. at 505-506.

Appendix B

Section 46.2(aa)(5), (11) of the Regulations provides:

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full

> payment promptly": *Provided,* That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

Respondent's alleged arrangements for financing, which would enable Respondent to pay produce creditors, is not payment in accordance with the PACA and is therefore not relevant to the issue of the existence of Respondent's roll-over debt. "Commercially reasonable" terms for the payment of produce creditors are not relevant to the existence of roll-over debt. Respondent has not proven or even alleged that, at the time of the hearing, these "commercially reasonable" agreements were reduced to a writing in accordance with 7 C.F.R. § 46.2(aa)(11) and provided that Respondent was to pay produce creditors within 30 days after the produce was accepted.

Moreover, the payment practices of others in the perishable agricultural commodities industry has no relevance to whether Respondent in this proceeding had roll-over debt at the time of the May 7, 1996, hearing.

Third, Respondent contends that several relevant factors, which were not considered, should have been considered in connection with the sanction to be imposed against Respondent (Petition for Reconsideration at 4).

Respondent contends that one factor that must be considered when imposing a sanction is whether Respondent's conduct threatens to undermine the PACA's purpose of licensing responsible persons, as follows:

Appendix B

> The United States Department of Agriculture's (hereinafter "Department") stated policy is to only license responsible companies. What is more responsible than a company which lost $400,000 to an embezzlement paying all its suppliers rather than walking away or declaring bankruptcy? It sold one of its units, it accepted a loan from an employee (without any date on which it has to be repaid), it gave up its warehouse, and it stayed open seven days a week. Its principal was willing to use his home and life insurance policies, as well as [Respondent's] units in the Brooklyn Terminal Market as collateral to obtain an SBA loan sufficient to pay all suppliers in full plus a fine to the Department. It was the Department that frustrated this loan by refusing to settle on a fine and threatening revocation, thereby making any loan impossible. [Respondent], a previously reputable licensee, suffered a loss through circumstances totally beyond its control and worked and struggled to ensure that everyone was paid in full and as quickly as possible. It is exactly this type of company that the Department should endeavor to preserve.

Petition for Reconsideration at 4-5.

The record establishes that Mr. Steven Kanowitz undertook a number of steps to correct Respondent's financial problems and demonstrated a *bona fide* commitment to turning the business around. *In re Kanowitz Fruit and Produce, Co., Inc., supra*, slip op. at 6. However, despite Respondent's commendable efforts to pay produce suppliers, the record establishes that Respondent failed to make full payment

promptly of the agreed purchase prices for many lots of perishable agricultural commodities that it purchased, received, and accepted in interstate or foreign commerce and that such failures constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires payment — not good intentions to pay produce sellers or commendable efforts to pay produce sellers. The Department's policy is to revoke the PACA license of a respondent that has not made full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce and fails to make such payments by the time of the hearing. This policy is designed not only to deter purchasers of perishable agricultural commodities from failing to make full payment promptly, but also to limit participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.[3] Respondent's failure to pay establishes that Respondent is not financially responsible.

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3. *Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d. Cir. 1967), *cert. denied*, 389 U.S. 835 (1967); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1274 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1216 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 785 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 621 (1993); *In re Roxy Produce Wholesalers, Inc.*, 51

(Cont'd)

Appendix B

In light of the record in this proceeding, which establishes Respondent's efforts to pay produce creditors and indicates that Respondent's inability to pay produce creditors began when some of Respondent's employees embezzled inventory valued between $300,000 and $400,000 from Respondent, it should be emphasized that the revocation order in this proceeding is not being issued for any punitive reasons. Respondent has done nothing worthy of punishment. Respondent has committed no action even remotely resembling a crime. The offenses here were *mala prohibita,* not *mala in se.* There is nothing inherently evil in being unable to pay one's creditors promptly. But, there is no place in the highly-regulated perishable agricultural commodities industry for a firm that paid produce sellers from 2 weeks to 117 weeks late in violation of the PACA.

Further, Respondent asserts that the cause of Respondent's violation (embezzlement) and the effect of the revocation of

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(Cont'd)
Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). *See also Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

Appendix B

Respondent's PACA license on Respondent's business, Respondent's employees, the families of Respondent's employees, and the neighborhood in which Respondent's business is located should have been considered when determining the sanction to be imposed (Petition for Reconsideration at 5-6).

I disagree with Respondent. "[T]his Department routinely denies requests for a lenient sanction based on the interests of [a] respondent's customers, community or employees." *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987). Collateral effects of a respondent's PACA license revocation are relevant neither to a determination whether a respondent made full payment promptly as required, nor to the sanction to be imposed for flagrantly or repeatedly failing to make full payment promptly.[4]

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4. *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1282-83 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225-28 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Hogan Distributing Co.*, 55 Agric. Dec. 622, 639 (1996) (the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that Respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (adverse impact of revocation of Respondent's PACA license on Respondent's creditors is not relevant); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990) (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in

(Cont'd)

Fourth, Respondent contends that sanctions imposed against those who violate the PACA are not uniform and thus arbitrary and capricious (Petition for Reconsideration at 7-9).

I disagree with Respondent. The imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than

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business); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 571 (1989) (collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec, 557, 564 (1989) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1249 n.8 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (the effect of revocation of a PACA license on those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1644 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978) (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1887 (1975) (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

sanctions imposed in other cases. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir. 1991); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978) (per curiam); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970); *In re Saulsbury Enterprises*, 56 Agric. Dec. __, slip op. at 18-20 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Volpe Vito, Inc.*, 56 Agric. Dec __, slip op. at 112 (Jan. 13, 1997). Moreover, the PACA has no requirement that there be uniformity in sanctions among violators.

The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the statutes entrusted to the Secretary for enforcement, and there is no requirement for uniformity. In a failure-to-pay-promptly case instituted under a statute similar to the PACA, the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229), it is explained that uniformity is not required:

> Respondents argue that the suspension imposed by the ALJ is excessive and unwarranted . . ., because there is no "uniformity" in the sanction with other cases, which impose less severe sanctions, and thus the primary purpose — deterrence for respondents and others similarly situated is not achieved. Respondents are incorrect.
>
> There is no requirement that there be uniform sanctions in like cases.

Appendix B

In re Ozark County Cattle Co. (Decision and Order as to National Order Buying Company and Thomas D. Runyan), 49 Agric. Dec. 336, 371 (1990). See also *In re Floyd Stanley White*, 47 Agric. Dec. 229, 309 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988).

Fifth, Respondent contends that it is improper for Complainant to have a "sanction witness" testify because the testimony is self-serving, taints the impartiality of the proceedings, is highly prejudicial, and tests the impartiality of the ALJ (Petition for Reconsideration at 9).

This case is governed by the sanction policy adopted by the Secretary of Agriculture in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which provides:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative

officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

Moreover, since 1971, the Department has followed the policy of permitting, and in most types of cases encouraging, the complainant and the respondent to introduce evidence at administrative disciplinary proceedings to aid the administrative law judge and the judicial officer in determining what sanction to impose in the event that it is found that a violation occurred.[5]

The recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less than that recommended by administrative officials.[6] Witnesses for parties

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5. *In re R.H. Produce, Inc.*, 43 Agric. Dec. 511, 527-29 (1984); *In re Larry W. Peterman*, 42 Agric. Dec. 1848, 1850 (1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985); *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. 1930, 1944 (1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 n.3 (1982); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1950 n.9 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 416 (1980); *In re Samuel Esposito*, 38 Agric. Dec. 613, 656-63 (1979); *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 177 n.6 (1978); *In re Eric Loretz*, 36 Agric. Dec. 1087, 1096 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1854-55 (1975); *In re J.A. Speight*, 33 Agric. Dec. 280, 310-13 (1974); *In re Professional Commodity Serv.*, 32 Agric. Dec. 585, 586-91 (remand order), *second remand order*, 32 Agric. Dec. 592 (1973), *final decision*, 33 Agric. Dec. 14 (1974); *In re George Rex Andrews*, 32 Agric. Dec. 553, 579 (1973); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 505 n.20, *reconsideration denied*, 31 Agric. Dec. 843, 847-50 (1972); *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1596 n.39 (1971).

6. *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

in these proceedings frequently testify regarding the appropriate sanction to be imposed. I am not aware of any proceeding, including the instant proceeding, in which sanction testimony from witnesses called by either party affected the impartiality of an administrative law judge or the judicial officer or in any way prejudiced an administrative law judge or the judicial officer.

Sixth, Respondent contends that revocation of Respondent's PACA license would not deter other PACA licensees from violating the PACA.

The Department's policy is to revoke the PACA license of a respondent that has not made full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce and fails to make such payments by the time of the hearing.[7] This sanction policy is harsh, but has consistently been upheld by the courts.[8] There are many steps

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7. *See, e.g., In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 788 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1623 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S.Ct. 474 (1995); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1441 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 765 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 629-42 (1989); *In re McQueen Brothers Produce Co.*, 47 Agric. Dec. 1462, 1467 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Carpenito Bros. Inc.*, 46 Agric. Dec. 486, 506 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988); *In re Clarence Miller Co.*, 43 Agric. Dec. 529, 532 (1984); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 123, 149-50 (1984).

8. *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric.

(Cont'd)

that can be taken to minimize the likelihood of payment violations, and therefore, severe sanctions imposed on payment violators should have a significant deterrent effect in the produce industry.

Seventh, Respondent contends that the imposition of a civil penalty, rather than revocation of Respondent's PACA license, would be in accord with Congressional intent, would deter violations of the PACA, and would serve as an example "of to what extent a 'responsible' company should go to to ensure that their vendors are paid promptly" (Petition for Reconsideration at 11).

I disagree with Respondent. While the PACA was amended to allow the imposition of civil penalties (section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. I 1995)), the amendment does not eliminate the sanctions of license revocation and suspension. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides, as follows:

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Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

Appendix B

(e) Alternative Civil Penalties

> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e) (Supp. I 1995).

Under the provisions of this amendment, the Secretary of Agriculture may now assess civil penalties in lieu of suspending or revoking a PACA license. The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

> *Section 11 — Imposition of civil penalty in lieu of suspension or revocation*
>
> Section 11 authorizes USDA to assess civil monetary penalties not to exceed $2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it

> continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

> MR. HATAMIYA. . . .
>
> . . . .
>
> In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

Appendix B

. . . .

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

. . . .

Another, area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently

> authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

These statements make clear that, although USDA supported the amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious violations" of the PACA.

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period March 1993 through January 1996, by failing to make full payment promptly to 48 sellers of the agreed purchase prices for 170 lots of perishable agricultural commodities in the total amount of $402,345.79.

The appropriate sanction for failure-to-pay cases, like this case, is license revocation. Allowing Respondent to pay a civil

penalty and continue to purchase perishable agricultural commodities in interstate or foreign commerce or to serve a suspension, when Respondent had failed to pay promptly for large produce purchases over a long period of time, with substantial produce debt still owing, would defeat the purposes of the PACA. A civil penalty or a suspension under these circumstances would not protect produce sellers and would not serve as a sufficient deterrent to others.

For the foregoing reasons and the reasons set forth in the Decision and Order filed March 21, 1997, *In re Kanowitz Fruit and Produce, Co., Inc., supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[9] Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on March 21, 1997. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed March 21, 1997, is reinstated, with allowance for time passed.

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9. *In re Volpe Vito, Inc.*, 56 Agric. Dec. __, slip op. at 10 (Apr. 16, 1997) (Order Denying Petition for Reconsideration); *In re City of Orange*, 56 Agric. Dec. __, slip op. at 3 (Mar. 25, 1997) (Order Granting Request to Withdraw Petition for Reconsideration); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. __, slip op. at 6 (Mar. 19, 1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. __, slip op. at 15 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Saulsbury Enterprises*, 56 Agric. Dec. __, slip op. at 28 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Petition for Reconsideration).

Appendix B

Order

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and Respondent's PACA license is revoked, effective 30 days after service of this Order on Respondent.

Done at Washington, D.C.
June 5, 1997

s/ William G. Jenson
William G. Jenson
Judicial Officer

APPENDIX C — DECISION AND ORDER OF JUDICIAL OFFICER WILLIAM G. JENSON IN *IN RE: KANOWITZ FRUIT AND PRODUCE CO., INC.* DATED AND FILED MARCH 21, 1997

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. D-95-504

In re: Kanowitz Fruit and Produce, Co., Inc.,

Respondent

Decision and Order

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant), instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA); the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) (hereinafter Regulations); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice), by filing a Complaint on November 8, 1994.

On March 1, 1996, Complainant filed an Amended Complaint which alleges that, during the period March 1993 through December 1993, Kanowitz Fruit and Produce Co., Inc. (hereinafter Respondent), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 18 sellers of the agreed purchase prices for 62 lots of perishable agricultural commodities in the total amount of

$206,850.69, which Respondent purchased, received, and accepted in interstate or foreign commerce and that, during the period January 1994 through January 1996, Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 30 sellers of the agreed purchase prices for 108 lots of perishable agricultural commodities in the total amount of $195,495.10, which Respondent purchased, received, and accepted in interstate or foreign commerce (Amended Complaint ¶¶ III, IV). Respondent filed an Answer on December 19, 1994, and an Amended Answer on April 1, 1996, in which Respondent denied violating the PACA.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on May 7, 1996, in New York, New York. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Sherylee F. Bauer, Esq. of New York, New York, represented Respondent. The ALJ issued a bench decision on May 27, 1996, in which he concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. 201) and revoked Respondent's PACA license (Tr. 208). On May 29, 1996, in accordance with 7 C.F.R. § 1.142(c)(2), the ALJ filed a written copy of the decision announced orally from the bench, which the ALJ excerpted from the transcript, corrected for spelling, punctuation, and transcription errors (hereinafter Initial Decision and Order).

On June 24, 1996, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject

to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On July 17, 1996, Complainant responded to Respondent's appeal, and on July 18, 1996, the case was referred to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues are not complex and are controlled by established precedents, and thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

PERTINENT STATUTORY PROVISION AND REGULATION

Section 2(4) of the PACA provides:

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce —

. . . .

---

1. The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.]

7 U.S.C. § 499b(4).

Section 8(a) of the PACA provides:

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title,

Appendix C

> . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. § 499h(a).

Section 46.2(aa)(5), (11) of the Regulations provides:

> (aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:
>
> . . . .
>
> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
>
> . . . .
>
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly", *Provided*, That the party

claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11) (1993).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

. . . .

Findings of Fact

1. Respondent, Kanowitz Fruit and Produce Co., Inc., is a corporation organized and existing under the laws of the State of New York. Its business mailing address is 37-39-41 Brooklyn Terminal Market, Brooklyn, New York 11236.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License Number 760337 was issued to Respondent on September 8, 197[5]. This license has been renewed annually. . . .

3. Before 1993, Respondent was in good financial condition and appeared to have paid its creditors on a timely basis. . . .

4. In 1993, Respondent discovered that employees had stolen inventory from Respondent. The amount stolen has been estimated by Respondent as being between $300,000 and $400,000. The police were notified, but informed Respondent that there was insufficient evidence to enable them to prosecute the alleged perpetrators.

5. During the period . . . March 1993 [through] December 1993, Respondent failed to make full payment promptly to 18 sellers [of] the agreed purchase prices of 62 lots of perishable agricultural commodities, in the total amount of $206,850.69, which Respondent had purchased, received, and accepted in interstate [or] foreign commerce. Payments for these transactions were [made] from 2 weeks to 117 weeks late[, and not all sellers received the full amount originally owed to them.]

6. In an effort to correct its financial problems, Respondent undertook a number of steps. It borrowed approximately $50,000 from its bookkeeper and office manager, Frances Falcone; it sold a warehouse; it sold one of three units in the Brooklyn Terminal Market; it opened its business 7 days a week; and . . . Mr. Steven Kanowitz, [Respondent's president], obtained a small business loan using his home and a life insurance policy as collateral. Mr. Steven Kanowitz has made a bona fide commitment to turning the business around.

7. Nevertheless, during January 1996, [a United States Department of Agriculture (hereinafter USDA)] investigator visited Respondent's business establishment and inspected Respondent's books and records, and this investigation revealed that during the period . . . January 1994 through January 1996, Respondent failed to make full payment promptly to 30 sellers [of] the agreed purchase prices of 108 lots of perishable agricultural commodities in the total amount of $195,495.10, which Respondent had purchased, received, and accepted in interstate [or] foreign commerce. . . . [Respondents made payments for these transactions as of the time of the hearing. However, one produce seller, Finest Fruits, Inc., received less than full payment].

Appendix C

8. During the period April 15 through 19, 1996, [USDA's] investigator again visited Respondent's place of business and again inspected Respondent's books and records. This compliance review revealed that during the period . . . February 1996 [through] April 1996, Respondent failed to make full payment promptly to sellers [of] the agreed purchase prices of 100 lots of perishable agricultural commodities in the total amount of $277,437.87, which Respondent had purchased, received, and accepted in interstate [or] foreign commerce. Respondent has paid a large amount of this debt, but nevertheless, approximately $125,000 of this debt still remains unpaid.

9. Respondent has frequently issued checks to its sellers in interstate commerce which have been returned by its bank because Respondent had insufficient funds on deposit to cover these checks. Respondent's office manager, Ms. Falcone, estimated that these insufficient fund[s] checks averaged about six to seven each month.

10. In addition to the sums still owed [for produce purchased in interstate or foreign commerce], . . . which are in the amount . . . of [approximately] $125,000, Respondent also owes money to sellers in intrastate commerce and to the Internal Revenue Service.

11. With respect to all amounts alleged to have been unpaid to sellers in interstate [or foreign] commerce in the Complaint and Amended Complaint, . . . Respondent failed to make [full] payment promptly as that term is defined in section 46.2(aa) of the Regulations [(7 C.F.R. § 46.2(aa) (1993))].

12. There were no written agreements by Respondent with any of the sellers [identified in the Complaint and the Amended Complaint] to provide for different terms of payment in accordance with the requirement in section 46.2(aa)(11) of the Regulations [(7 C.F.R. § 46.2(aa)(11) (1993))]. In fact, Respondent has never entered into any such agreement to extend payment terms.

Conclusion of Law

In failing to make [full] payment promptly of the agreed purchase prices for many lots of perishable agricultural commodities that it purchased, received, and accepted [in interstate or foreign commerce during the period March] 1993 [through] April 1996, Respondent has committed willful, flagrant, and repeated violations of section 2[(4)] of the PACA (7 U.S.C. § 499b[(4)]).

Discussion

This is a disciplinary proceeding pursuant to section 8 of the PACA (7 U.S.C. § 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. 2163 (1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. No. 1041, 71st Cong., 2d Sess. [1] (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856[, 857-58] (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584[, 587] (6th Cir. 1971).

Appendix C

Enforcement is effectuated through a system of licensing with penalties for violation. H.R. Rep. No. 1041, 71st Cong., 2d Sess. [3] (1930). *See also* [*George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988[, 990] (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) .nakes it unlawful, *inter alia*, for any commission merchant, dealer, or broker to fail to make full payment promptly of its obligations with regard to transactions involving perishable agricultural commodities made in interstate [or foreign] commerce. Full payment promptly is defined by the Department in 7 C.F.R. § 46.2(aa)(5) [(1993)] as requiring payment of the agreed purchase prices for produce within 10 days after the day on which produce is accepted.

Complainant alleges that Respondent violated the PACA and the Regulations by failing to make full and prompt payment of the agreed purchase prices with respect to the transactions alleged in the Amended Complaint.

Respondent denie[s] violating the PACA. The $206,850.69 indebtedness of Respondent, which [is] the subject of [paragraph III of the Amended] Complaint, was finally paid . . . by November 20, 1995[, but not all sellers received the full amount originally owed to them]. Payments were made from 2 weeks to 117 weeks late.

[T]he $195,495.10 indebtedness of Respondent, which is the subject of [paragraph IV] of the Amended Complaint, was finally paid by May 7, 1996[, except that one produce seller received less than the original amount owed]. However, Respondent currently has outstanding and past-due indebtedness of approximately $125,000 for perishable agricultural

commodities that it purchased in interstate [or foreign] commerce.

Respondent's failure to make timely payment, as alleged in the Complaint and Amended Complaint, violates the prohibitions of section 2 of the PACA (7 U.S.C. § 499b). *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631 (1976), *aff'd [per curiam]*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

Moreover, Respondent's failure to pay promptly . . . and in full for a total of 170 transactions occurring over a period of 34 months and totalling over $400,000 constitutes repeated and flagrant violations of section 2 of the PACA. . . . The 170 violations are repeated because repeated means more than one and 170 [violations are] certainly more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the length of time during which the violations occurred. . . .[2]

[2. *See Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *United Fruit & Vegetable Co. v. Director of the Fruit and Vegetable Div.*, 668 F.2d 983 (8th Cir.) (holding 127 violations involving over $750,000 over 11 months constitute repeated and flagrant violations of the PACA), *cert. denied*, 456 U.S. 1007 (1982); *Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972) (finding 26 violations involving $19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000), *cert. denied*, 389 U.S. 835 (1967).]

Furthermore, these violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards [statutory requirements]. *Cox v. United States Dep't of Agric.*, [925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991)]; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *In re Henry S. Shatkin*, 34 Agric. Dec. 296[, 297-98] (1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-69 [(1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974)].

Respondent knew, or should have know[n], that it could not have made prompt payments for the large amount of perishable [agricultural commodities] it ordered, yet Respondent continued to make purchases. Respondent was aware of the [PACA's] requirement[s], yet continued to buy knowing that each purchase would result in another violation.

Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not, and consequently could not, pay suppliers. It deliberately shifted the risk of nonpayment to its suppliers. The suppliers were required to involuntarily, in some cases unknowingly, extend credit to Respondent.

Thus, in this case in which two [USDA] compliance investigations indicated that Respondent had incurred additional "roll over" debt in order to meet its obligations on the transactions that were the subject of the original [Complaint] and of the Amended Complaint, . . . Respondent has intentionally violated the [PACA] and operated in careless disregard of the payment requirements of the PACA, and

Appendix C

Respondent's violations were therefore willful. *In re Atlantic Produce Co., supra*, 35 Agric. Dec. [at 1641-42]; . . . *In re Hogan Distributing, Inc.*, 55 Agric. Dec. [622, 628-30 (1996)].

The appropriate sanction for Respondent's violations is revocation of Respondent's PACA license. Even though Respondent has attempted to correct its financial problems, these problems have continued since 1993. As indicated, a large brunt of Respondent's problems has been passed on to its [produce] suppliers. This [practice of shifting risk of nonpayment to produce suppliers] is exactly the type of practice that the [PACA] is designed to prevent and correct.

Where a Respondent is not in compliance at the time of a hearing, the appropriate sanction is revocation of Respondent's [PACA] license. [In re The Caito Produce Co., 48 Agric. Dec. 602, 633-36 (1989);] *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118[, 149-50] (1984). . . .

. . . .

In this case, Respondent failed to make full payment promptly for [170] lots of perishable agricultural commodities over a period of many years for a total of approximately $400,000. Furthermore, since the filing of the Amended Complaint, Respondent has incurred new indebtedness and currently owes approximately $125,000 on the new debt.

Where a respondent is not currently in compliance, but has in fact "rolled over" its debts, revocation is the appropriate sanction. *In re S W F Produce, Co.*, 54 Agric. Dec. [693, 700] (1995); *In re The Caito Produce Co.*, [*supra*], 48 Agric. Dec. [at 633]; *In re Gilardi Truck & Transp., Inc.*, *supra*, 43 Agric. Dec. at 149-50.

Appendix C

The Judicial Officer has recently stated that there is no basis for considering facts in mitigation of the sanction where a respondent has failed to pay for produce. *See In re Atlantic Produce Co.*, 54 Agric. Dec. [701, 712-15[3] (1995)].

Taking all these factors into consideration, the sanction sought by Complainant, which is revocation of Respondent's [PACA] license, [is appropriate]. *In re J.H. Norman & Sons Distributing Co.*, 37 Agric. Dec. 705 (1978); *In re George Steinberg & Son, Inc., supra.*

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a *prima facie* case.[4] The burden of proof does not, however, require

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3. See *Erratum*, inside front cover of Part Three (PACA), 55 Agric. Dec. January-June (1996).

4. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). *See also Attorney General's Manual on the Administrative Procedure Act* 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward' "); *3 Kenneth C. Davis, Administrative Law Treatise* § 16.9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

Complainant to disprove each of Respondent's assertions or theories of the case.

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,[5] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.[6] Complainant has proved it case by much more

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5. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

6. *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. __, slip op. at 6 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. __, slip op. at 20 n.2 (Nov. 15, 1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen*

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than a preponderance of the evidence, which is all that is required.

I completely agree with the ALJ's Initial Decision and Order, except to the extent that the ALJ apparently agrees with Respondent that Respondent has made full payment of the amounts alleged to be due in the Complaint and the Amended Complaint, prior to the commencement of the May 7, 1996, hearing.

To the contrary, Respondent attached documents to its Answer which establish that Respondent settled with produce sellers for less than the total amounts due. For example, Respondent paid $5,849.75 to Godwin Produce Co. to settle a debt of $16,173.10; $35,648.05 to Michael Santelli & Sons, Inc., to discharge and extinguish a debt of $50,514.45; and $3,655 to Southern Produce Distributors, Inc., on a debt of $6,676. Further, my examination of Respondent's payments to the produce sellers identified in paragraph IV of the Amended Complaint reveals that all were eventually paid in full, except for Finest Fruits, Inc., Transaction No. 74, which produce seller apparently received $2,451 on a debt of $3,284 (Amended Complaint ¶ IV; RX 39; Tr. 147-48). Nevertheless, Respondent argues that such "full payment" entitles Respondent to a "slow pay" rather than a "no pay" sanction; to wit, a suspension of Respondent's PACA license in lieu of a revocation. However, the law and the Department's policy are clear that partial

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Brothers Produce Co., 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

payments do not equal "full payment" in accordance with the PACA and do not negate a violation of the PACA.[7]

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7. *In re The Caito Produce Co., supra*, 48 Agric. Dec. at 625-28 (where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the PACA); *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 588 (1989) (Respondent contends that it no longer owes any money to the 22 produce sellers who agreed to take 60 cents on the dollar as a result of Respondent's bankruptcy; it has been repeatedly held that when a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment and does not negate a violation of the PACA), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1249 (1985) (although there may have been an occasional dispute as to the quality of produce, so that acceptance of partial payment in full satisfaction would be regarded as an accord and satisfaction, constituting full payment, there is no evidence in that respect with respect to most of the produce sellers; where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment and does not negate a violation of the PACA), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685 (1980) (even where a produce seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute "full payment" and does not negate a violation of the PACA), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 414 (1980) (Respondent has failed to make full payments of the agreed purchase prices for produce it accepted and received; the debts were fully discharged under subsequent agreements between Respondent and the produce sellers providing for partial payments; it has been held that although acceptance of a partial payment of the purchase price by a

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Appendix C

The record establishes that, at the start of the hearing, Respondent had not paid all its produce sellers in full; that the policy of converting "no pay" into "slow pay," therefore, is not available to Respondent on this record; and that revocation of Respondent's PACA license is appropriate under the circumstances in this case.

Respondent raises five issues in Respondent's Appeal Petition (hereinafter RAP). First, Respondent argues that the ALJ erred by allowing introduction at the hearing of evidence of Respondent's outstanding indebtedness. Respondent asserts that it is denied due process when such "new claims" are the basis for the ALJ's draconian sanction of revocation; and that the ALJ should have required Complainant to amend the Complaint, thereby giving Respondent the required procedural due process.

This argument is rejected, because the ALJ properly allowed and considered outstanding indebtedness. A respondent demanding that Complainant amend the Complaint before being

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seller under such an agreement fully satisfies and extinguishes the debt, it does not constitute full payment under the PACA); *In re Atlantic Produce Co.*, *supra*, 35 Agric. Dec. at 1633 (a plan of arrangement under which creditors accept less than "full payment" in full satisfaction of their claims does not negate a violation of the PACA); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884 (1975) (even though 35 of 49 produce sellers listed in the Complaint voluntarily released their claims in consideration of a settlement agreement of 30 cents on the dollar, such voluntary agreement does not constitute full payment promptly under the payment provision of the PACA); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975) (although partial payment may fully satisfy and extinguish the debt, it is, nonetheless, partial payment; partial payment is not full payment under the PACA).

allowed to show a respondent's current indebtedness at the hearing is a routine occurrence in these types of cases. On the surface, the argument seems logical, but it misses the whole point of the prompt payment provisions, which call for payment, not promises. When a respondent is in a failure-to-pay-promptly disciplinary hearing, the respondent must be in 100% compliance with the payment provisions of the PACA to escape license revocation. Allowing a respondent who has not paid all produce sellers in full by the time of the hearing to remain licensed would put produce sellers at financial risk. In a recent case, an ALJ took the position advanced in this proceeding by Respondent, and the Judicial Officer took the opportunity to set forth the Department's policy on this issue:

> The ALJ's views set forth above are based on a failure to apply the Department's policy stated, *inter alia*, in *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 629-42 (1989). In *Caito*, it is explained that a revocation order is warranted where a Respondent fails to pay promptly, over an extended period of time, for produce transactions involving a substantial amount of money. It is further explained, however, that if the Respondent demonstrates by the time of the hearing, or if no hearing is held, by the time Respondent files its Answer, (i) that it has made full payment of the transactions alleged in the Complaint, and (ii) such payment was not made by "robbing Peter to pay Paul," the sanction will be mitigated. *Caito* further states that, not only must Respondent be in present compliance with the payment provisions at the time of the hearing, or at the time the Answer is filed if there is no hearing, but, also, Respondent cannot even have agreements

> with creditors for payment to be made beyond 30 days. Finally, *Caito* makes it clear that if Complainant demonstrates that Respondent is merely "rolling over" its debt, by "robbing Peter to pay Paul," the sanction to be issued is for the violations alleged in the Complaint — not for the more current transactions in which Complainant shows that Respondent is merely "rolling over" its debt. Since the sanction is being imposed only for the transactions alleged in the Complaint, there is no need for Complainant to amend the Complaint in order to refute Respondent's allegation that the sanction for the Complaint-transactions should be mitigated because of later compliance.

In re S W F Produce Co., supra, 54 Agric. Dec. at 700.

At the hearing, Respondent's bookkeeper, Frances Falcone, testified that Respondent had outstanding current indebtedness of approximately $125,000 (Tr. 160-61). This amount (within a few hundred dollars) is corroborated by the balances in the "Summary table of unpaid transactions" (CX 24A at 6; Tr. 194). If the produce sellers listed in CX 24A, who did not get paid in full, are designated "Peter," and the produce sellers who got paid are designated "Paul," then the conclusion is ineluctable that Respondent "robbed Peter to pay Paul."

In order to avoid revocation of its PACA license, Respondent would have to have paid every produce seller in full by the time of the hearing. There is no escaping the fact that Respondent paid some produce sellers, but not others.

Second, Respondent contends that the debt owing at the time of the hearing is "new claims" and not "roll over debt." I find that the outstanding indebtedness at the time of the hearing, whether it is called "new claims" or "roll over debt," means that Respondent is not in 100% compliance with the payment provisions of the PACA at the time of the hearing, and license revocation, rather than license suspension, is the appropriate sanction. Thus, the ALJ did not err in finding the outstanding indebtedness at the time of the hearing to be "roll over debt."

Respondent argues that an infusion of "new capital" from a company retrenchment, an unsecured $50,000 loan, a secured small business loan, a factoring agreement, and a sale of assets means that produce sellers were paid with, I infer, money that would not normally have been available to pay produce sellers. Therefore, unlike Respondents in *Caito*, *Gilardi*, and *S W F*, Respondent urges that it did not "rob Peter to pay Paul." This argument is rejected, and I find Respondent did "rob Peter to pay Paul." It is not relevant where the money to pay the produce sellers originates. The only relevant factor is whether Respondent paid produce sellers in full by the date of the hearing. As it is, Respondent lacked the resources, from wherever derived, to pay all Respondent's produce sellers in full, which is the only relevant issue.

I agree with Complainant's description of the nature of Respondent's continuing roll over debt, as follows:

> Respondent's debt was not paid at the time of the hearing. The debt from the complaint and the amended complaint, which was incurred during the period March 1993 through January 1996, had been, at least in part, rolled over and continued from

> February 1996 until April 1996. Therefore, Kanowitz has had continuous rollover debt from the time listed in the original complaint, March 1993, until May 7, 1996, the date of the hearing. The Administrative Law Judge found that this continuous indebtedness constitutes rollover of the debt alleged in the complaint and the amended complaint. Therefore, there is a continuous failure to pay.

Complainant's Response to Respondent's Appeal at 9.

Respondent knew, or should have known, that it could not make prompt payment for the large amounts of perishable agricultural commodities it ordered, but Respondent continued to operate. By continuing to operate without sufficient capitalization, Respondent deliberately shifted the risk of nonpayment to its produce suppliers, which is a willful violation of 7 U.S.C. § 499b(4).[8]

Third, Respondent, relying on *In re Atlantic Produce Co.*, 54 Agric. Dec. 701 (1995), contends that while mitigation may not be considered for determination of willfulness or flagrancy, the ALJ may consider mitigating circumstances when considering the sanction to be imposed (RAP at 8).

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8. *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. __, slip op. at 21-22 (Jan. 23, 1997); *In re Hogan Distributing, Inc.*, *supra*, 55 Agric. Dec. at 630-31; *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S.Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, *supra*, 52 Agric. Dec. at 622; *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, *supra*, 35 Agric. Dec. at 1641.

Respondent's argument is completely without merit. *Atlantic Produce* makes clear that mitigating circumstances are not to be considered, either in determining willfulness or in determining sanctions, if Respondent has failed to pay promptly for produce, as follows:

> Although *Caito* mentions briefly the Department's severe sanction policy, which has not been followed since *S.S. Farms Linn County*, *supra*, the overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, *excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time.* That doctrine is not altered by the new sanction policy set forth in *S.S. Farms Linn County*.[9]

In re Atlantic Produce Co., *supra*, 54 Agric. Dec. at 715 (emphasis added).

Fourth, Respondent argues that Complainant's recommendation of, and the ALJ's imposition of, the sanction of revocation, are arbitrary and capricious.

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9. The underlined portion of the quotation from *Atlantic Produce* was inadvertently omitted from Agriculture Decisions. See *Erratum*, inside front cover of Part Three (PACA), 55 Agric. Dec. January-June (1996).

Appendix C

Respondent's underlying argument is that Complainant has arbitrarily and capriciously recommended revocation for Respondent, when there are many other PACA licensees who are not in compliance, and who are not receiving like sanctions. Respondent argues that Complainant's revocation sanction "bears no relationship to the purposes of the PACA (i.e., to ensure prompt payment of perishable vendors and reasonable regulation of dealers who attempt to comply with the Act)." (RAP at 10.)

This argument is rejected. The PACA has no requirement that there be uniformity in sanctions among violators. Moreover, Respondent gives no authority for the proposition that the revocation sanction herein is contrary to the purposes of the PACA.

The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the statutes entrusted to the Secretary for enforcement, and there is no requirement for uniformity. In a failure-to-pay-promptly case instituted under a statute similar to the PACA, the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) (hereinafter Packers and Stockyards Act), it is explained that uniformity is not required:

> Respondents argue that the suspension imposed by the ALJ is excessive and unwarranted . . ., because there is no "uniformity" in the sanction with other cases, which impose less severe sanctions, and thus the primary purpose — deterrence for respondents and others similarly situated — is not achieved. Respondents are incorrect.

Appendix C

There is no requirement that there be uniform sanctions in like cases.

In re Ozark County Cattle Co. (Decision and Order as to National Order Buying Company and Thomas D. Runyan), 49 Agric. Dec. 336, 371 (1990).

Almost the exact situation raised by Respondent in the proceeding, *sub judice*, was addressed in another decision under the Packers and Stockyards Act which specifically stated that Complainant is free to recommend and the ALJ is free to fashion the remedial sanction:

> The cases cited by respondent for a reduction in the suspension period are not persuasive. Even if the facts were exactly the same, there is no requirement that there be uniform sanctions in like cases. The P&S [Packers and Stockyards Administration] and the ALJ are free to recommend and to fashion, respectively, the remedial sanction to fit the situation at hand, because "uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others." (Citation omitted.)

In re Floyd Stanley White, 47 Agric. Dec. 229, 309 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988).[10]

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10. *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric.*, *supra*, 925 F.2d at 1107; *Spencer* (Cont'd)

Respondent also contends that the ALJ does not have sufficient record evidence of Respondent's wrongdoing to support revocation.

The ALJ's choice of revocation as the sanction can be found arbitrary and capricious, if the ALJ exhibited no rational basis for the treatment of the evidence, if the ALJ failed to consider the relevant factors, or if the ALJ demonstrated clear errors of judgment. The standard of review relevant to this inquiry is set forth in *Lansing Dairy* as follows:

> The "narrow" scope of review under the arbitrary and capricious standard . . . (5 U.S.C. § 706(2)(A)) is set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), as follows:
>
> > Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based

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Livestock Comm'n Co. v. Department of Agric., 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. CFTC*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978 (per curiam); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970); *In re Saulsbury Enterprises*, 56 Agric. Dec. __, slip op. at 18-20 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Volpe Vito, Inc.*, 56 Agric. Dec. __, slip op. at 112 (Jan. 13, 1997).

> on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The Court further stated in *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974):

> But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

In re Lansing Dairy, Inc., 50 Agric. Dec. 1453, 1505-06 (1991), *rev'd sub nom. Farmers Union Milk Marketing Cooperative*, Nos. 1:89-CV-281, 5:91-CV-104, 1992 WL 71372 (W.D. Mich. Mar. 30, 1992), *reprinted in* 51 Agric. Dec. 24, 37 (1992), *rev'd*, 39 F.3d 1339 (6th Cir. 1994), *cert. denied*, 116 S.Ct. 50 (1995).

As discussed, *supra*, I have determined that the ALJ properly evaluated the evidence in a rational manner, made no clear errors in judgment, and considered all relevant factors. Respondent's argument that the ALJ's revocation sanction was arbitrary and capricious is rejected.

Fifth, Respondent contends that the sanction imposed on Respondent is unduly harsh, in light of mitigating circumstances and the fact that the USDA supported recent Congressional enactment of civil penalties in lieu of revocation or suspension. I disagree.

Appendix C

This case is governed by the sanction policy adopted by the Secretary in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which in pertinent part, provides:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

However, the sanction policy in *In re S.S. Farms Linn County, Inc.*, *supra*, does not alter the doctrine in *In re The Caito Produce Co.*, *supra*.[11] The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time. Respondent willfully, flagrantly, and repeatedly

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11. *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. __, slip op. at 49 (Nov. 15, 1996); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. __, slip op. at 26 (Sept. 12, 1996); *In re Hogan Distributing, Inc.*, *supra*, 55 Agric. Dec. at 633; *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1442-43 (1995); *In re Midland Banana & Tomato Co.*, *supra*, 54 Agric. Dec. at 1329.

violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) over a period from March 1993 to January 1996, by failing to make full payment to 48 sellers of the agreed purchase prices of 170 lots of perishable agricultural commodities in the total amount of $402,345.79. Moreover, Respondent had approximately $125,000 in outstanding indebtedness at the time of the May 7, 1996, hearing. Respondent's excuse for its failure to pay (embezzlement by two of Respondent's employees) is not sufficient to prevent the revocation of its license for violations of the PACA. Further, this sanction is in accord with the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the PACA.

Mr. Bruce W. Summers, Senior Marketing Specialist, Trade Practices Section of the PACA Branch, a Division of the Agricultural Marketing Service, testified as to the appropriateness of the sanction as follows:

BY MS. McCAVITT:

Q. Mr. Summers, do you represent Complainant at this proceeding?

[BY MR. SUMMERS:]

A. Yes, I do.

Q. And, are you familiar with the type of violations alleged in the complaint and the amended complaint?

A. Yes, I am.

Q. Are you aware of whether Complainant has a recommendation it wishes to make to the Administrative Law Judge on the sanction he would issue if he finds that the Respondent violated the Act as alleged in the complaint and the amended complaint?

A. Yes.

Q. Would you tell Judge Bernstein what that recommendation is?

A. The Complainant would recommend that the Administrative Law Judge revoke the license of Kanowitz Fruit and Produce as a result of its violations of Section 2[(4)] of the PACA.

Q. And, can you tell Judge Bernstein what factors were considered by Complainant in making the recommendation?

A. Yes, there are several factors that we considered in making this recommendation. The numbers of violations, I believe that the documentation that has been introduced through Mr. Neilson as a result of his investigations shows that the Respondent has committed violations in well over 150 transactions, violations involving failure to make full payments promptly.

In addition, I believe the documentation shows that these transactions involved dollar amounts which you've seen $300,000. We also

considered as a aggravating factor, the number of non-sufficient fund[s] checks which have been issued by the Respondent which we believe have a very disruptive [e]ffect to the trade in trying to conduct their business.

Furthermore, a factor we considered is that they, as of yesterday at 5:00 when Mr. Neilson quit his phone calls, still had not brought their payment practices into compliance. At that time, I believe Mr. Neilson's phone calls showed that the firm still had past due and unpaid transactions exceeding $50,000.

Finally, I would consider the serious effect that these types of violations, violations involving failure to make full payment properly on the produce industry.

Q. Why is the industry unique that this could be a serious offense?

A. Well, the produce industry is unique because of the produce itself. It's highly perishable, it has to move great distances in a short period of time before it starts to decay. If you wait too long, you can't sell it at all, so just by the very nature, that makes the industry unique.

Because of this characteristic, produce transactions occur generally over the phone between people which may or may not have ever met each other, produce is expensive, so the transactions

involve very high dollar amounts and the — in order to accomplish these transactions there had to be a great deal of trust between parties to ship this produce over great distance to people that you have never met; buyers trusting their shippers to ship the quality and quantity they need to meet their customers demands; conversely, suppliers are trusting that the receivers will accept it and pay for it in accordance with the contract terms that were discussed at the time of the negotiations.

So, this all works to make the produce industry unique. We believe it's the Secretary of Agriculture's role in this industry to insure that there's a level playing field for all members of the industry to conduct business on and we believe this is done through enforcement — even-handed enforcement of the Perishable [Agricultural] Commodities Act.

Q. If Judge Bernstein takes the recommendation that you've suggested, do you think there would be any other [e]ffect on the industry?

A. Well, certainly if a revocation is issued by the Administrative Law Judge, the obvious [e]ffect is it puts Kanowitz Fruit and Produce Corporation out of the industry by revocation of their license, they'd no longer be legally allowed to operate, so that's one obvious [e]ffect of the revocation so there's a deterrent here, obviously to that corporation, but also there's a deterrent, we believe — a message of deterren[ce] in a sense to the

> produce industry as a whole that the Secretary of Agriculture considers these types of violations to be very serious and that they'll be prosecuted wherever and whenever they occur.

Tr. 100-03.

Respondent argues that USDA's support of the recent civil penalties legislation (section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. I 1995))), means that revocation in this case is inappropriate. I disagree. While USDA did support amendments to the PACA which allow the imposition of civil penalties, it did not support the elimination of the sanctions of license revocation and suspension. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides, as follows:

> **(e) Alternative Civil Penalties**
>
> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and

> amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e) (Supp. I 1995).

Under the provisions of this amendment, the Secretary of Agriculture may now assess civil penalties in lieu of suspending or revoking a PACA license. The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

> *Section 11 — Imposition of civil penalty in lieu of suspension or revocation*
>
> Section 11 authorizes USDA to assess civil monetary penalties not to exceed $2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

Appendix C

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

> MR. HATAMIYA. . . .
>
> . . . .
>
> In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.
>
> . . . .
>
> MR. BISHOP. You want flexibility in the assessment of fees?
>
> MR. HATAMIYA. . . .
>
> . . . .
>
> Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting

somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty

Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

These statements make clear that, although USDA supported the amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious violations" of the PACA.

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period March 1993 through January 1996, by failing to make full payment to 48 sellers of the agreed purchase prices for 170 lots of perishable agricultural commodities in the total amount of $402,345.79.

The appropriate sanction for failure-to-pay cases, like this case, is license revocation. This admittedly harsh sanction is designed not only to deter purchasers of perishable agricultural commodities from failing to make full payment promptly, but also is necessary to fulfill the congressional intent that only financially responsible persons should be engaged in the perishable agricultural commodities industry.[12] Allowing

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12. *Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. Cir. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, *supra*, 443 F.2d at 588-89; *Zwick v. Freeman*, *supra*, 373 F.2d at 117; *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. __, slip op. at 50-51 (Nov. 15, 1996); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. __, slip op. at 16-17 (Sept. 12, 1996); *In re Boss*

(Cont'd)

Appendix C

Respondent to pay a civil penalty and continue to purchase perishable agricultural commodities in interstate or foreign commerce or to serve a suspension, when Respondent had failed to pay promptly for large produce purchases over a long period of time, with substantial produce debt still owing, would defeat the purposes of the PACA. A civil penalty or a suspension under these circumstances would not protect produce sellers and would not serve as a sufficient deterrent to others.

Finally, Respondent argues that his 25 employees will suffer harm from any sanction other than a civil penalty. However, "this Department routinely denies requests for a lenient sanction based on the interests of [a] respondent's customers, community or employees." *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987). Collateral effects of a Respondent's PACA

(Cont'd)

Fruit & Vegetable, Inc., supra, 53 Agric. Dec. at 785; *In re Full Sail Produce, Inc., supra*, 52 Agric. Dec. at 621; *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co., supra*, 41 Agric. Dec. at 2425; *In re Finer Foods Sales Co., supra*, 41 Agric. Dec. at 1168; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re Connecticut Celery Co., supra*, 40 Agric. Dec. at 1133; *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). *See also Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

license revocation are relevant neither to a determination whether Respondent made full payment promptly as required, nor to the sanction to be imposed for flagrantly or repeatedly failing to make full payment promptly.[13]

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13. *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. __, slip op. at 60-61 (Nov. 15, 1996) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. __, slip op. at 28-30 (Sept. 12, 1996) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Hogan Distributing Co., supra*, 55 Agric. Dec. at 639 (the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that Respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (adverse impact of revocation of Respondent's PACA license on Respondent's creditors is not relevant); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990) (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in business); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 571 (1989) (collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co., supra*, 44 Agric. Dec. at 1249 (the effect of revocation of a PACA license on

(Cont'd)

Appendix C

For the foregoing reasons, the following Order should be issued.

Order

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and Respondent's PACA license is revoked, effective 30 days after service of this Order on Respondent.

Done at Washington, D.C.
March 21, 1997

s/ William G. Jenson
William G. Jenson
Judicial Officer

(Cont'd)
those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co., supra*, 35 Agric. Dec. at 1644 (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co., supra*, 34 Agric. Dec. at 1887 (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

APPENDIX D — DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE EDWIN S. BERNSTEIN IN *IN RE: KANOWITZ FRUIT AND PRODUCE COMPANY, INC.* DATED AND FILED MAY 29, 1996

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. D-95-504

In re: Kanowitz Fruit and Produce Company, Inc.,

Respondent

DECISION AND ORDER

The following bench decision (corrected for errors of spelling, punctuation and transcription) is excerpted from the record of the hearing held May 7, 1996, in New York City:

> This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930 as amended, 7 U.S.C. 499a *et seq.*, referred to as the PACA, pursuant to the Regulations promulgated pursuant to the PACA at 7 C.F.R. § 46.1, *et seq.*, and pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary at 7 C.F.R. § 1.130, *et seq.*
>
> This proceeding was instituted by a Complaint filed on November 8, 1994, and an Amended Complaint filed on March 1, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

Appendix D

The Amended Complaint alleged that Respondent, Kanowitz Fruit & Produce Co., Inc., violated section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly of the agreed purchase prices for 62 lots of perishable agricultural commodities for a total of $206,850.69 that were paid from 2 to 117 weeks late and failed to make full payment promptly of the agreed purchase prices for 108 lots of perishable agricultural commodities for a total of $195,495.10.

Respondent filed an Answer on December 19, 1994, and an Amended Answer on April 1, 1996, in which it denied violating the PACA. A hearing was held before me on May 7, 1996, in New York City.

Complainant is represented by Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent is represented by Sherylee F. Bauer, Esq., of New York City.

Findings of Fact

1. Respondent, Kanowitz Fruit and Produce Co., Inc., is a corporation organized and existing under the laws of the State of New York. Its business mailing address is 37-39-41 Brooklyn Terminal Market, Brooklyn, New York 11236.

2. At all times material, Respondent was licensed under the provisions of the PACA. License Number 760337 was issued to Respondent on September 8, 1976. This license has been renewed

annually and is next subject to renewal on or before September 8, 1996.

3. Before 1993, Respondent was in good financial condition and appeared to have paid its creditors on a timely basis without complaint.

4. In 1993, Respondent discovered that employees had stolen inventory from Respondent. The amount stolen has been estimated by Respondent as being between $300,000 and $400,000. The police were notified, but informed Respondent that there was insufficient evidence to enable them to prosecute the alleged perpetrators.

5. During the period between March 1993 and December 1993, Respondent failed to make full payment promptly to 18 sellers for the agreed purchase prices of 62 lots of perishable agricultural commodities in the total amount of $206,850.69 which Respondent had purchased, received and accepted in interstate and foreign commerce. Payments for these transactions were paid from two weeks to 117 weeks late.

6. In an effort to correct its financial problems, Respondent undertook a number of steps. It borrowed approximately $50,000 from its bookkeeper and office manager, Frances Falcone. It sold a warehouse; it sold one of three units in the Brooklyn Terminal Market; it opened its business seven days a week and, most recently, Mr. Steven Kanowitz, the business's owner, obtained a small

business loan using his home and a life insurance policy as collateral. Mr. Steven Kanowitz has made a bona fide commitment to turning the business around.

7. Nevertheless, during January 1996, the Department's investigator revisited Respondent's business establishment and inspected Respondent's books and records and this investigation revealed that during the period from January 1994 through January 1996, Respondent failed to make full payment promptly to 30 sellers for the agreed purchase prices of 108 lots of perishable agricultural commodities in the total amount of $195,495.10 which Respondent had purchased, received and accepted in interstate and foreign commerce. Though all of this debt has been paid as of the time of the hearing, a substantial amount of the debt was paid during the past week.

8. During the period of April 15 through 19, 1996, the Department's investigator again visited Respondent's place of business and again inspected Respondent's books and records. This compliance review revealed that during the period from February 1996 until April 1996, Respondent failed to make full payment promptly to sellers for the agreed purchase prices of 100 lots of perishable agricultural commodities in the total amount of $277,437.87 which Respondent had purchased, received, and accepted in interstate and foreign commerce. Respondent has paid a large amount of this debt, but nevertheless, approximately $125,000 of this debt still remains unpaid.

9. Respondent has frequently issued checks to its sellers in interstate commerce which have been returned by its bank because Respondent had insufficient funds on deposit to cover these checks. Respondent's office manager, Ms. Falcone, estimated that these insufficient fund checks averaged about six to seven each month.

10. In addition to the sums still owed as alleged in this Complaint, which are in the amount remaining of $125,000, Respondent also owes money to sellers in intrastate commerce and to the Internal Revenue Service.

11. With respect to all amounts alleged to have been unpaid to sellers in interstate commerce in the Complaint and Amended Complaint, these amounts were unpaid and Respondent failed to make payment promptly as that term is defined in section 46.2(aa) of the regulations.

12. There were no written agreements by Respondent with any of these sellers to provide for different terms of payment in accordance with the requirement in section 46.2(aa)(11) of the regulations. In fact, Respondent has never entered into any such agreement to extend payment terms.

Conclusion of Law

In failing to make payment promptly of the agreed purchase prices for many lots of perishable agricultural commodities that it purchased, received

and accepted between 1993 and April 1996, Respondent has committed wilful, flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b).

Discussion

This is a disciplinary proceeding pursuant to section 8 of the PACA (7 U.S.C. § 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. § 2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers and brokers. H.R. Rep. 1041, 71st Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Chidsey v. Guerin*, 443 F.2d 584 (6th Cir. 1971); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976). Enforcement is effectuated through a system of licensing with penalties for violation. H. Rep. 1041, 71st Cong., 2d Sess. (1930). See, also, *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker to fail to make full payment promptly of its obligations in regard to

transactions involving perishable agricultural commodities made in interstate commerce. Full payment promptly is defined by the Department in 7 C.F.R. § 46.2(aa)(5)) as requiring payment of the agreed purchase prices for produce within 10 days after the day in which produce is accepted.

Complainant alleges that Respondent violated the PACA and the regulations by failing to make full and prompt payment of the agreed purchase prices with respect to the transactions alleged in the Amended Complaint.

Respondent denied violating the PACA. The $206,850.69 indebtedness of Respondent which was the subject of the original Complaint was finally paid off in its entirety by November 20, 1995. Payments were made from two weeks to 117 weeks late.

Of the $195,495.10 indebtedness of Respondent which is the subject of the Amended Complaint, this amount was finally paid by May 7, 1996. However, Respondent currently has outstanding and past due indebtedness of approximately $125,000 for perishable agricultural commodities that it purchased in interstate commerce.

Respondent's failure to make timely payment as alleged in the Complaint and Amended Complaint violates the prohibitions of section 2 of the PACA (7 U.S.C. § 499b). *Atlantic Produce*, 35 Agric. Dec. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978).

Moreover, Respondent's failure to pay promptly in accordance and in full for a total of 170 transactions occurring over a period of 34 months and totalling over $400,000 constitutes repeated and flagrant violations of section 2 of the PACA. *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 373-74 (5th Cir. 1980); *G. Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom., G. Steinberg and Son, Inc. v. Butz, supra*, 491 F.2d 988.

The 170 violations are repeated because repeated means more than one and 170 is certainly more than one. The violations are flagrant because of the number of violations, the amount of money involved and the length of time during which the violations occurred. *See Veg-Mix, Inc.*, 48 Agric. Dec. 595 (1989). That decision held that seven transactions for which that Respondent had failed to make full and prompt payment constituted repeated and flagrant violations of the PACA. *See also Melvin Beene Produce v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984); *Reese Sales Company v. Hardin*, 458 F.2d 183 (9th Cir. 1972); *United Fruit & Veg. Co. v. Dir. of Fruit & Veg. Div.*, 668 F.2d 983 (8th Cir. 1982).

Furthermore, these violations were wilful. A violation is wilful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the climate of a statute. *Cox v. United States Dep't of Agric.*, No. 90-1384 (8th Cir.

February 13, 1991); *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, Inc., supra*, 32 Agric. Dec. 236, 263-69; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961).

Respondent knew, or should have know that it could not have made prompt payments for the large amount of perishables it ordered, yet Respondent continued to make purchases. Respondent was aware of the Act's requirement, yet continued to buy knowing that each purchase would result in another violation.

Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not, and consequently could not pay suppliers. It deliberately shifted the risk of non-payment to its suppliers. The supplies were required to involuntarily, in some cases unknowingly, extend credit to Respondent.

Thus, in this case in which two compliance investigations indicated that Respondent had incurred additional "roll over" debt in order to meet its obligations on the transactions that were the subject of the original and of the Amended Complaint, under these circumstances, Respondent has intentionally violated the Act and operated in careless disregard of the payment requirements of the PACA and Respondent's violations were therefore wilful. *Atlantic Produce, supra*, 35 Agric. Dec. 1631 (1976); *Rudolph John Kafcsak*, 39 Agric. Dec. 683 (1980), *aff'd mem.*, 673 F.2d 1329 (6th

Cir. 1981); *Hogan Distributing, Inc.*, 55 Agric. Dec. __ (April 22, 1996).

The appropriate sanction for Respondent's violations is revocation of Respondent's PACA license. Even though Respondent has attempted to correct its financial problems, these problems have continued since 1993. As indicated, a large brunt of Respondent's problems have been passed on to its suppliers. This is exactly the type of practice that the Act is designed to prevent and correct.

Where a respondent is not in compliance at the time of a hearing, the appropriate sanction is the revocation of respondent's license. *Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *Finer Food Sales Co.*, 41 Agric. Dec. 1154 (1982), *aff'd* 708 F.2d 774 (D.C. Cir. 1983); *Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984).

This admittedly harsh sanction policy has been consistently upheld by the Federal Circuit Courts in numerous cases. *Maine Potato Growers*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583 (1989), *aff'd sub nom., Joe Phillips & Associates, Inc. v. Dep't of Agriculture*, Civil Action No. 89-70354 (9th Cir. 1991) (unpublished).

The decisive factors that determine the appropriate sanction include the number of violations, the seriousness of violations, the impact

of violations on the industry as a whole, the interests of the Department in insuring the trust relationship which exists between members of the industry is maintained, the management decisions made by Respondent, and the financial status of Respondent.

In this case, Respondent failed to make full payment promptly for lots of perishable agricultural commodities over a period of many years for a total of approximately $400,000. Furthermore, since the filing of the Amended Complaint, Respondent has incurred new indebtedness and currently owes approximately $125,000 on the new debt.

Where a respondent is not currently in compliance, but has in fact "rolled over" its debts, revocation is the appropriate sanction. *The Caito Produce Company*, 48 Agric. Dec. 602 (1989); *Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984); *SWF Produce, Inc.*, 54 Agric. Dec. __ (March 16, 1995).

The Judicial Officer has recently stated that there is no basis for considering facts in mitigation of the sanction where respondent has failed to pay for produce. *See Atlantic Produce Co. and Joseph Pinto*, 54 Agric. Dec. __ at page 16 (March 23, 1995).

Taking all these factors into consideration, the sanction sought by Complainant which is revocation of Respondent's license must be granted. *J. H. Norman & Sons Distributing Co., supra*, 37 Agric.

Dec. 705; *G. Steinberg & Son, supra*, 32 Agric. Dec. 236.

Order

The license of Respondent Kanowitz Fruit and Produce Company, Inc., is revoked.

Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days following this decision unless Respondent appeals this Decision pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

This completes my oral decision.

Written copies of this bench decision and order are being provided to the parties in accordance with § 1.142(c)(2) of the Rules of Practice.

s/ Edwin S. Bernstein
EDWIN S. BERNSTEIN
Administrative Law Judge

May 29, 1996

APPENDIX E — RELEVANT STATUTES AND REGULATIONS

(OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930 (7 CFR Part 46)

* * *

§ 46.2 Definitions

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulation, in the Act, or in the trade shall be construed as follows:

* * *

(aa) "Full payment promptly" is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

* * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

* * *

(11) Parties who elect to use different times of payment than those set forth in

paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly", *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it. Nothing in the regulations in this part shall limit the seller's privilege of shipping under a closed or advise bill of lading or other arrangement requiring cash on delivery unless there has been express prior agreement to the contrary between the parties; or prohibit cooperative associations from settling with their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. If there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of the undisputed amount.

* * *

Appendix E

STATUTORY TRUST

§ 46.46 Statutory trust.

* * *

(e) Prompt payment and eligibility for trust benefits.

(1) The times for prompt accounting and prompt payment are set out in §46.2(z) and (aa). Parties who elect to use different times for payment must reduce their agreement to writing before entering into the transaction and maintain a copy of their agreement in their records, and the times of payment must be disclosed on invoices, accountings, and other documents relating to the transaction.

(2) The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities as defined in § 46.2(dd) and paragraph (a)(1) of this section.

* * *

Appendix E

UNFAIR CONDUCT
(7 U.S.C. § 499b)

SEC. 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

* * *

(4) For any commission merchant, dealer or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction is bad; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c). However, this paragraph shall

not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.

* * *

SEC. 8. SUSPENSION AND REVOCATION OF LICENSE
(7 U.S.C. § 499h)

(e) ALTERNATIVE CIVIL PENALTIES. In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 6, that a commission merchant, dealer or broker has violated section 2 or subsection (b) of this section, the Secretary may asses a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts (7 U.S.C. 499h.)

* * *

Supreme Court, U.S.
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(2)

No. 98-1211

In the Supreme Court of the United States

OCTOBER TERM, 1998

KANOWITZ FRUIT AND PRODUCE CO., INC.,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture acted arbitrarily and capriciously in revoking petitioner's license as a dealer in perishable agricultural commodities, rather than imposing a fine, as the sanction for petitioner's repeated late payment of suppliers.

2. Whether the Secretary, in making his decision on the level of sanctions to apply to petitioner, was required to consider certain additional factors.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

ABL Produce, Inc. v. *United States Dep't of Agric.*, 25 F.3d 641 (8th Cir. 1994)	9, 10, 11
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946)	7
Butz v. *Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973)	7
Conforti v. *United States*, 74 F.3d 838 (8th Cir.), cert. denied, 519 U.S. 807 (1996)	9, 10, 11
Harry Klein Produce Corp. v. *United States Dep't of Agric.*, 831 F.2d 403 (2d Cir. 1987)	5
Havana Potatoes of New York Corp. v. *United States*, 136 F.3d 89 (2d Cir. 1997)	5

Statutes and regulations:

Packers and Stockyards Act, 1921, 7 U.S.C. 181 *et seq.*	7
Perishable Agricultural Commodities Act, 7 U.S.C. 499a-499s (1994 & Supp. III 1997)	2
7 U.S.C. 499b(4)	2
7 U.S.C. 499c (1994 & Supp. III 1997)	2
7 U.S.C. 499h(a)	2
7 U.S.C. 499h(b)(1)	9
7 U.S.C. 499h(b)(3)	9
7 U.S.C. 499h(e) (Supp. III 1997)	2

Regulations—Continued: Page

7 C.F.R.:
Section 46.2(aa)(5) 2
Section 46.2(aa)(11) 2

Miscellaneous:

S. Rep. No. 2507, 84th Cong., 2d Sess. (1956) 2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 166 F.3d 1200 (Table). The opinions of the Judicial Officer of the Department of Agriculture (Pet. App. 7a-31a, 32a-71a) and of the administrative law judge (Pet. App. 72a-83a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1998. The petition for a writ of certiorari was filed on January 27, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1930, Congress enacted the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499a-499s (1994 & Supp. III 1997). That law sought to prevent unfair and fraudulent practices in the perishable products industry against the producers of perishable agricultural products, who routinely must ship their goods to dealers thousands of miles away and who are unusually vulnerable to abuses by dealers. See S. Rep. No. 2507, 84th Cong., 2d Sess. 3 (1956). PACA requires a dealer in perishable agricultural commodities to obtain a license from the Secretary of Agriculture. See 7 U.S.C. 499c (1994 & Supp. III 1997). The Act then makes it unlawful for a licensed dealer "to fail * * * [to] make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C. 499b(4). Pertinent Agriculture regulations define "full payment promptly" as "[p]ayment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted," unless the parties "elect to use different times of payment," in which case they "must reduce their agreement to writing before entering into the transaction." 7 C.F.R. 46.2(aa)(5) and (11).

If a dealer violates those provisions, the Secretary may suspend its license; if the violation is "flagrant or repeated," the Secretary may entirely revoke the license. See 7 U.S.C. 499h(a). As an alternative to suspension or revocation, the Secretary may instead assess a civil penalty of up to $2000 "for each violative transaction or each day the violation continues." 7 U.S.C. 499h(e) (Supp. III 1997).

2. Petitioner is a fruit and produce dealer located at the Brooklyn Terminal Market in Brooklyn, New York. Pet. App. 37a. After an investigation, the Secretary filed an administrative complaint against petitioner in 1994, alleging that from February through November 1993, petitioner had failed to make full payment promptly to 18 sellers of produce, and that as of the date of the complaint it owed those sellers $206,850.60 for unpaid and past-due payments. *Id.* at 2a. Petitioner contended that the sellers had agreed to the late payments, and that it had delayed making the payments because of financial difficulties that were caused by what petitioner said was the theft of $300,000 to $400,000 of its inventory by employees. The police found insufficient evidence of the thefts to warrant prosecution. *Id.* at 2a, 37a.

In 1996, the Secretary inspected petitioner's records and then filed an amended complaint alleging that, although petitioner had by then paid the earlier past-due amounts that were up to two years late, petitioner had incurred new past-due debts for its produce purchases between January 1994 and January 1996 in an amount totaling $195,495.10. By the time of the hearing before an administrative law judge (ALJ), petitioner showed that it had paid off those amounts as well, but the ALJ found that petitioner now owed approximately $125,000 for produce that it had accepted since the filing of the amended complaint. Pet. App. 2a-3a. The ALJ found that petitioner had been rolling over its debt, that is, paying off its existing debt by delaying payment for later shipments of produce. *Id.* at 3a. The ALJ concluded that petitioner had no written agreements with any sellers to extend the payment terms. *Id.* at 76a. Accordingly, the ALJ found that revocation of petitioner's license was the proper sanc-

tion because petitioner's violations of the prompt payment requirements of the statute and regulations were repeated, flagrant, and willful. See *id.* at 3a, 42a-43a, 79a- 80a.

Petitioner appealed to the Department of Agriculture's Judicial Officer, but the Judicial Officer adopted the ALJ's decision as the final decision of the Secretary, after making minor changes in the ALJ's opinion and adding extensive discussion of his own. See Pet. App. 32a-71a. The Judicial Officer rejected petitioner's defenses, including its argument that mitigating circumstances make revocation of its license too harsh a penalty. The Judicial Officer explained that "because of the peculiar nature of the perishable agricultural commodities industry, and the congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time." *Id.* at 59a.

Petitioner sought reconsideration, but the Judicial Officer denied the petition with another lengthy opinion. Pet. App. 7a-31a. The Judicial Officer noted that "the revocation order in this proceeding is not being issued for any punitive reasons. * * * There is nothing inherently evil in being unable to pay one's creditors promptly. But, there is no place in the highly-regulated perishable agricultural commodities industry for a firm that paid produce sellers from 2 weeks to 117 weeks late in violation of the PACA." *Id.* at 18a. The Judicial Officer granted petitioner's request for a stay

of the license revocation pending judicial review. *Id.* at 4a.*

3. Petitioner sought judicial review of the Secretary's final decision in the court of appeals, but that court denied the petition and directed enforcement of the revocation order. Pet. App. 1a-6a. Noting that PACA is "an intentionally rigorous law," *id.* at 4a (quoting *Harry Klein Produce Corp.* v. *United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987)), the court of appeals concluded that the factual findings are supported by substantial evidence; the findings of petitioner's violations as flagrant and repeated are not an abuse of discretion; and the regulations' strict definition of prompt payment, which requires that agreements by suppliers to longer payment terms must be in writing, are not arbitrary, capricious, or contrary to the statute. *Id.* at 5a. The court rejected petitioner's argument that there are mitigating factors, such as embezzlement by its employees, that make license revocation unfair, concluding that "financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of an ongoing lack of funds." *Id.* at 6a (quoting *Havana Potatoes of New York Corp.* v. *United States*, 136 F.3d 89, 94 (2d Cir. 1997)).

---

* While the stay apparently expired when the court of appeals issued its mandate, the Department of Agriculture informs us that it will not enforce the revocation of petitioner's license until this Court finally disposes of this petition.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other circuit. Review by this Court is therefore not warranted.

1. As the court of appeals, the Judicial Officer, and the administrative law judge (ALJ) each explained, the Perishable Agricultural Commodities Act (PACA) imposes unusually strict requirements on dealers, based upon the distinctive nature of the interstate trade in fruits and vegetables. A producer of perishable produce must contract with and ship to dealers very quickly to enable the produce to reach consumers before spoiling. For the same reason, the dealer in turn must quickly arrange for further transshipment of fresh produce to the places of ultimate sale to consumers. Thus, because the producer's goods have already been resold by the dealer, the producer has reduced recourse against a dealer who does not make quick payment to the producer. Because of that characteristic of the perishable commodities market, Congress established a strict licensing scheme for perishable produce dealers and the Secretary adopted regulations requiring payment to be made either within 10 days of shipment or, if later, under the terms of a pre-existing written agreement. Petitioner argues for leniency based upon what it alleges to be informal industry practice, but the Act and its regulations do not recognize such informal exceptions to the strict rule of prompt payment.

2. Petitioner does not dispute that its actions violated the statute and regulations. Rather, petitioner appears to dispute only the severity of the sanction imposed upon it—revocation of its license. Pet. 14. Indeed, petitioner does not even appear to dispute that its violations were repeated and intentional, ranging

over a period of more than three years. According to several inspections of petitioner's records, petitioner delayed payment on hundreds of lots of produce to dozens of sellers, constantly maintained overdue debt that ranged between $125,000 and more than $200,000, and failed to obtain any written agreements with sellers that would have permitted those late payments to comply with applicable regulations. Consequently, petitioner agrees that the Secretary properly could impose at least some sanction on it. *Ibid.*

Petitioner argues, however, that the Secretary acted arbitrarily and capriciously in revoking its license, instead of imposing a fine. Pet. 9-12. That issue does not merit this Court's review. As this Court explained in the closely-related context of the Packers and Stockyards Act, 1921, 7 U.S.C. 181 *et seq.*, the Secretary's choice of sanction for a violation of a statutory standard "is peculiarly a matter for administrative competence." *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185 (1973) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112 (1946)). Petitioner essentially asks this Court to re-examine the exercise of discretion by the ALJ in making the initial decision and by the Judicial Officer in reviewing and adopting it—an exercise of discretion that was reviewed and upheld by the court of appeals under the applicable statutory standards.

Indeed, petitioner's principal argument (Pet. 9-10) is that the Secretary erred as to only one narrow matter: placing no significance on petitioner's having obtained approval of a Small Business Administration (SBA) loan in the amount of $250,000, which petitioner alleges would have enabled it to become current on past-due accounts and to pay a fine. Because the loan was conditional on petitioner's retaining its license, petitioner

argues that if the Secretary had only imposed a fine, it could remain in business and finally overcome the ongoing effects of its employees' past embezzlement. The Judicial Officer rejected that argument, concluding that a financing arrangement such as petitioner's SBA loan "is not payment in accordance with the PACA and is therefore not relevant to the issue of the existence of [petitioner's] roll-over debt." Pet. App. 15a.

That decision is not arbitrary or capricious. Although in ordinary commercial relations it might be acceptable for a dealer in financial difficulty to obtain a loan enabling repayment of overdue debts to suppliers, PACA does not tolerate such practices. The statute is not simply a scheme to assure that suppliers are eventually paid. Rather, it requires immediate payment of suppliers, or a formal agreement in advance to delay payment, in recognition of the special circumstances of interstate trade in perishable produce. The Act thus authorizes revocation of the license of any perishable commodities dealer who, like petitioner, repeatedly and intentionally fails to make timely payments to its suppliers. The Secretary was therefore entitled to disregard petitioner's last-minute efforts to deal with its persistent practice of rolling over its debts, since petitioner engaged in that illegal practice so consistently for more than three years.

3. Petitioner next argues (Pet. 12-19) that the court of appeals erred by failing to apply a "relevant factors" test, pursuant to which petitioner asserts that a reviewing court may reduce the severity of the penalty after considering three criteria: whether the licensee's actions threatened to undermine the purposes of the Act, whether any mitigating circumstances excuse the violation, and whether the sanction imposed would have

an unduly harsh effect on the company. Petitioner is mistaken in seeking to apply those factors in this case.

a. Petitioner asserts (Pet. 12-13) that the Eighth Circuit has adopted a "relevant factors" test in two cases, and thus that the decision below conflicts with those decisions. That contention is without merit. The Eighth Circuit cases upon which petitioner relies concern violation of a different provision of PACA from the one at issue in this case. The severity of the respective violations in the Eighth Circuit cases is not comparable to the repeated and flagrant violations committed by petitioner in this case. Both Eighth Circuit cases, *Conforti* v. *United States*, 74 F.3d 838, cert. denied, 519 U.S. 807 (1996), and *ABL Produce, Inc.* v. *United States Department of Agriculture*, 25 F.3d 641 (1994), involved a provision of PACA that prohibits a licensee from employing any person who is or has been "responsibly connected" with any other company whose license has been revoked or is currently suspended, or which has outstanding reparation orders. 7 U.S.C. 499h(b)(1) and (3). In each case, an ALJ had imposed a 30-day suspension on a licensee for employing such a responsibly-connected person, the Judicial Officer had imposed a harsher sanction, and the court of appeals reinstated the ALJ's original 30-day suspension, citing certain mitigating circumstances. Those decisions reflect what the court there held to be less serious violations of PACA. The Eighth Circuit reasoned that the employment by a licensee of a person who was involved with another company that violated the Act, while a serious matter, does not directly involve the Act's core purpose of reducing the risk of non-payment of produce suppliers. See *Conforti*, 74 F.3d at 842; *ABL*, 25 F.3d at 646. The Eighth Circuit justified its more searching review by contrasting the

PACA violations in those cases with a licensee's failure to make timely payments. See *ibid.* The Eighth Circuit's own rationale thus makes its decisions inapplicable to the present case.

Moreover, the Eighth Circuit also relied on other factors that distinguish those cases from this one. In *ABL*, the court of appeals noted that the licensee had made good faith efforts to prevent the banned person from routinely taking orders or otherwise handling its business. See 25 F.3d at 646. In *Conforti*, the court explained that the banned person was only a "front man" who lacked actual authority or an interest in the licensee. See 74 F.3d at 842. Those cases thus do not resemble the present case, in which the licensee itself violated the affirmative provisions of the Act by persistently and intentionally making late payments over several years. Petitioner's claim of a "conflict," therefore, is unpersuasive.

b. In any event, even if the three "relevant factors" that petitioner cites should be assessed in a decision whether to revoke a license for failure to make timely payments, a proper application of that test would not cast doubt on the Secretary's decision to revoke petitioner's license. Petitioner first argues (Pet. 13) that revocation of its license undermines the purposes of PACA because the Act seeks to assure that produce dealers are financially responsible, and its SBA loan arrangement would have saved the company and made it sound, rather than make it bankrupt and thus unable to pay its debts in full. That argument is not persuasive because, as the administrative decisions and the court of appeals' opinion stressed, the actual purpose of PACA is not simply to secure eventual payment of suppliers but rather to assure their routine prompt payment. If petitioner had not flagrantly violated the

Act over a period of several years and had sought to remedy the situation more promptly, its suppliers would not have to face the risk of petitioner's possible bankruptcy. License revocation will prevent petitioner from repeating its past violations and deter other licensees from similar behavior in the future.

Petitioner's other "relevant factors" are of even less merit. Petitioner's deliberate and consistent disregard of the plain terms of the Act and regulations is not excused by its claims to having been victimized by an alleged embezzlement. As the court of appeals explained, businesses routinely delay paying their creditors due to financial difficulties not of their own making. See Pet. App. 6a. But PACA provides that companies which find themselves in such financial straits may not continue to buy perishable fruits and vegetables and deliberately delay paying for them in order to pay old debts to suppliers.

Petitioner's third "relevant factor" does not logically apply here. Concern about the unintended consequences of a too-harsh sanction was found relevant in the Eighth Circuit cases, where the court of appeals thought that a 90-day suspension would, as a practical matter, simply put the licensee out of business, see *Conforti*, 74 F.3d at 843, and where revocation of the license would require the company's owner, in turn, to disassociate himself from his other PACA licensee, see *ABL*, 25 F.3d at 646. Here, petitioner makes no such argument about an indirect collateral effect. It argues only that revocation of its license will put it out of business and take away the jobs of its employees. Pet. 14. But the Act and its regulations anticipate that the licenses of some dealers will be revoked, and it is within the Secretary's discretion to take that action against

dealers that have repeatedly failed to make timely payments to suppliers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1999